90-1884

NO. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Prudential Insurance Company
of America,

Petitioner,

v.

Billy W. Brown,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS FOURTEENTH
COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether Respondent's state common law claims of breach of contract, breach of duty of good faith and fair dealing, and gross negligence are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et. seq.

LIST OF PARTIES

The parties to the proceedings below are as follows:

Petitioner

Prudential Insurance Company of America[1];

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1. Prudential Insurance Company of America has the following subsidiaries: PRUCO, Inc.; Chatham Eight Corporation; Flor-Ag Corporation; Newark Rehabilitation, Inc.; PG Realty, Inc.; PIC Realty Corp.; Pruco Life Insurance Co. of Texas; Pruco Securities Corp.; Pruco Services, Inc ; Prudential Agricultural Credit, Inc.; Prudential Capital & Investment Services, Inc.; Prudential-Bache Group, Inc.; Prudential-Bache Securities Inc.; The Prudential Bank and Trust Co.; Pru Capital, Inc.; PruLease, Inc.; Prudential Interfunding Corp.; PruCapital Management, Inc.; PruCapital Securities Co., Inc.; Pru Supply, Inc.; Prudential Support Operations, Inc.; Prudential Funding Corp.; Prudential Health Care Plan, Inc.; Prudential Health Care Plan of Oklahoma, Inc.; Prudential Property & Casualty Insurance Company; Prudential Commercial Insurance Co.; Prudential Insurance Brokerage Inc.; Prudential General Insurance Co.; Prudential Realty Partnerships, Inc.; Prudential Realty Securities, Inc.; Prudential Trust Co.; Prudential Reinsurance Co.; Dryden & Co., Inc.; Dryden General Agency; Essex Syndicate, Inc.; Gibraltar Casualty Co.; John Street Syndicate, Inc.; Pruco Managers, Inc.; Pruco Syndicate, Inc.; Pruco Life Insurance Company; Pruco Life Insurance Company of New Jersey; 745 Property Investments; Pruco Life Insurance Co. of Illinois; The Prudential Investment Corp.; The Prudential Asset Management Co., Inc.; Mercator Asset Management Co., Inc.; The Prudential Property Co., Inc.; The Prudential Mortgage Capital Co., Inc.; Prudential-LMI Commercial Insurance Company; Property & Casualty Insurance Co.; and Prudential Realty Securities II, Inc.

Respondent

Billy W. Brown.

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PETITION FOR WRIT OF CERTIORARI
TO THE TEXAS FOURTEENTH
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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner herein prays that a Writ of Certiorari issue to the Texas Fourteenth Court of Appeals to review

that Court's August 9, 1990 Judgment and Order in this proceeding.[2]

Opinions Below

The August 9, 1990 Judgment and Opinion of the Texas Fourteenth Court of Appeals from which review is sought is not reported, but is attached as Appendix A to this Petition.

The April 3, 1990 Judgment of the district court of Harris County, Texas, 151st Judicial District from which Petitioner appealed is not reported, but is attached as Appendix B to this Petition.

The May 2, 1989 Findings of Fact and Conclusions of Law of the district court of Harris County, Texas, 151st Judicial District from which Petitioners

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2. On February 6, 1991, the Texas Supreme Court denied Petitioner's Application for Writ of Error. On March 6, 1991, the Texas Supreme Court overruled Petitioner's timely-filed motion for rehearing.

appealed is not reported, but is attached as Appendix C to this Petition.

Jurisdiction

On August 9, 1990, the Texas Fourteenth Court of Appeals entered the Judgment from which review is sought. Jurisdiction is now conferred upon this Court by 28 U.S.C. Section 1257(a). The time for filing this petition for writ of certiorari began to run on March 6, 1991, the date of the Order of the Texas Supreme Court overruling petitioner's timely-filed motion for rehearing. See Sup. Ct. R. 13 (1991).[3]

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3. The February 6, 1991 Order of the Texas Supreme Court denying Petitioner's timely application for writ of error is attached as Appendix D to this Petition. The March 6, 1991 Order of the Texas Supreme Court overruling petitioner's motion for rehearing is attached as Appendix E to this Petition. The September 6, 1990 Order of the Texas Fourteenth Court of Appeals overruling petitioner's motion for rehearing is attached as Appendix F to this Petition.

Statutes and Rules Involved

Section 1002, Title 29, United States Code provides as follows:

For purposes of this subchapter:

1. The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (a) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits. . . .

5. The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

6. The term "employee" means any individual employed by an employer.

> 7. The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> 8. The term "beneficiary" means a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder.

29 U.S.C. § 1002 (1991).

Section 1144(a), Title 29, United States Code provides as follows:

> Except as otherwise provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (1991).

Statement of The Case

This case involves the determination of whether Respondent's state law claims are preempted by ERISA.

Factual Background

On March 18, 1964, the Independent Garagemen's Association Insurance Trust ("Insurance Trust") was created by the execution of an Agreement and Declaration of Trust by the Independent Garagemen's Association ("IGA").[4] This Insurance Trust was created for the purpose of obtaining major medical and life insurance for the

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4. The IGA is a trade organization whose membership is limited to employers who operate independent automotive repair shops throughout the United States. (Richey Depo. pp. 44, 50; SF 1523-24) During the relevant time period, IGA's name was changed to the Independent Automotive Service Association. For clarity, however, it will be referred to as the "IGA" for all time periods.

employees of employer members of the IGA. (Richey Ex. 2, p. 1)[5]

Petitioner, The Prudential Insurance Company of America ("Prudential"), issued a policy, effective May 15, 1976, of group medical insurance to the Insurance Trust (the "Policy"). (SF 2191-92; Richey Ex. 13). It is undisputed that Respondent, Billy W. Brown ("Brown"), at all time material to this lawsuit, was employed by Sonny's Automatic Transmission Service ("Sonny's"), an employer who was a member of the IGA and who participated in the Insurance Trust. (Richey Ex. 3; Richey Depo. pp. 35, 36, 38; Tr. 34) Thus, at all material times, Brown was

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5. Hereinafter, references to the record are as follows: "SF" means statement of facts; "TR" means transcript; "F.S. Tr." means first supplemental transcript; "E.P.Tr." means ERISA preemption trial transcript; "Richey Depo." means deposition of Jean Richey; "Richey Ex." means exhibit attached to the deposition of Jean Richey; "P.Ex." means plaintiff's exhibit; and "D.Ex." means defendant's exhibit.

insured under the Policy solely because of his capacity as an employee of Sonny's. (Tr. 34; SF 1486-87)

In April 1979, Brown was diagnosed as having bladder cancer. (Tr. 35; SF 640) Brown was treated by a number of physicians and underwent conventional surgery, chemotherapy, and radiation treatments in an attempt to cure the cancer. (SF 643) Without having determined whether these repeated conventional treatments were successful, Brown went to a Houston physician, Dr. Stanislaw R. Burzynski ("Burzynski"), and the Burzynski Research Institute, and was treated there with an experimental, non-FDA approved drug -- "antineoplaston" -- developed and manufactured by Burzynski. It is undisputed that Prudential, on its own or through the Insurance Trust as the

claims administrator, paid for all of Brown's cancer treatment -- including office visits to and lab work done by Burzynski -- with the sole exception of the costs incurred for antineoplastons. (SF 1533, 2284-85; D.Ex. 105; P.Ex. 99, p. 86) Prudential determined that antineoplastons were not "reasonably necessary", under the terms of the Policy, and that payment should be disallowed. (P.Ex. 99, p. 85; SF 2250-52).

Brown brought the present action against Prudential based on breach of contract, breach of duty of good faith and fair dealing, and gross negligence. (Tr. 34-40) Prudential thereafter asserted, in its Second Amended Original Answer, that all of Brown's claims are preempted by ERISA because: (1) Brown's employer, Sonny's, established and

maintained an "employee welfare benefit plan" by providing insurance for its employees through the Insurance Trust; and/or (2) the IGA established and maintained an "employee welfare benefit plan" for the benefit of employees of employer members of the IGA. (Defendant's Second Amended Original Answer is attached as Appendix "G.")

The case was originally tried on May 20, 1987, in which both a jury verdict and judgment were rendered in favor of Prudential. Brown thereafter filed a motion for new trial, which was granted, and on January 26, 1989, the case was again tried. In the second trial, both a jury verdict and judgment were rendered in favor of Brown. According to the judgment, the trial court found that none of Brown's claims were preempted and that Brown was

entitled to recover under each theory alleged. (Appendix B-14)

On May 2, 1989, the trial court entered its Findings of Fact and Conclusions of Law with respect to the issue of ERISA preemption holding that the Insurance Trust[6] is not an "employer" within the meaning of 29 U.S.C. § 1002(5), and that the IGA is not an "employee organization" as defined by 29 U.S.C. § 1002(4) (Appendix "C-11"). The trial court then held that Brown's state law claims are not preempted by ERISA. (Appendix C-11, 12)

On May 3, 1989, Prudential filed Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial

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6. Prudential did not even argue that the Insurance Trust is an employer, which of course, it is not; instead, Prudential argued that Sonny's Automatic Transmission Service is an "employer." The trial court, in its findings of fact and conclusions of law, never found that Sonny's was not an employer.

and Remittitur in which Prudential argued that all of Brown's claims are preempted by ERISA (Defendant's Motions for Judgment Notwithstanding the Verdict, New Trial and Remittitur are attached as Appendix "H.") The trial court, however, did not rule on such motions, and they were deemed overruled by operation of law.

On January 15, 1990, Prudential timely filed an appeal to the Texas Fourteenth Court of Appeals. In its brief, Prudential argued that all of Brown's claims are preempted by ERISA, as a matter of law, because: (1) Brown's employer, Sonny's, established an "employee welfare benefit plan" by providing insurance for its employees through the Insurance Trust; and/or (2) the IGA as a group of employers, acting on behalf of these employers,

established and maintained an "employee welfare benefit plan" subject to ERISA. See pp. 17-33 of Prudential's Brief to Fourteenth Court of Appeals.

Further, in its second point of error to the Fourteenth Court of Appeals, Prudential argued that:

> The trial court erred in finding in its Conclusion of Law that the Insurance Trust is not an employee welfare benefit plan and, thus, not governed by ERISA. The trial court also erred in finding that the transactions between the IGA Insurance Trust (the 'Insurance Trust'), the IGA members adopting the Insurance Trust (the 'Adopting Members'), and Prudential were mere purchases of insurance. . .

Id. at pp. 17-18.[7]

On August 9, 1990, the Texas Fourteenth Court of Appeals affirmed the

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7. Respondent has previously argued that Prudential failed to challenge the trial court's findings of fact and conclusions of law by a point of error to the Fourteenth Court of Appeals. This argument is unfounded based on the portion of Prudential's second point of error quoted above.

lower court and issued the opinion of which Prudential seeks review. See Appendix A. Prudential thereafter filed a timely motion for rehearing in the Fourteenth Court of Appeals arguing that Brown's claims are preempted by ERISA. On September 6, 1990, the Fourteenth Court of Appeals overruled Prudential's motion for rehearing. See Appendix "F."

On October 5, 1990, Prudential filed in the Texas Supreme Court, a motion for a seven-day extension of time to file an application for writ of error -- which the Texas Supreme Court granted. See Appendix "I." On October 15, 1990, Prudential timely filed its application for writ of error to the Texas Supreme Court, again arguing that all of Brown's claims are preempted by ERISA as a matter of law.

On February 6, 1991, the Texas Supreme Court denied Prudential's application for writ of error. See Appendix "D." On February 21, 1991, Prudential timely filed its motion for rehearing in the Texas Supreme Court -- which was thereafter overruled. See Appendix "E."

Prudential seeks review of the Texas Fourteenth Court of Appeals' decision rendered below. Prudential maintains in this Court that all of Brown's state law claims are preempted by ERISA, as a matter of law, because: (1) Brown's employer established and maintained an "employee welfare benefit plan" by providing insurance for its employees through the Insurance Trust; and, in the alternative, (2) the IGA established and maintained an "employee welfare benefit plan" for the benefit of

employees of employer members of the IGA.

Reasons for Granting the Writ

The decision of the Fourteenth Court of Appeals conflicts with the decisions of this Court in FMC Corp. v. Holliday, 111 S. Ct. 403 (1990), and Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987); and conflicts with the decisions of the Fifth Circuit in Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990), and Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. April 12, 1991) (1991 WL 77363). Further, the Fourteenth Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court:

> Whether an employer who provides insurance for its employees through a trust agreement has established an

"employee welfare benefit plan" as that term is defined under ERISA.

Today, there are literally thousands of employers who are too small to obtain group insurance on their own. These employers, such as Sonny's, typically band together and procure insurance through a trust agreement or other types of agreements to facilitate the transfer of group insurance to their employees. The question at issue here is of vital importance to these small businesses who should be given the adequate security that their "group policies" are protected by ERISA and that there will be no unnecessary litigation, as occurred in this case, in determining or applying conflicting law. The Fourteenth Court of Appeals' decision below adds numerous factors that a smaller employer must prove in

order to be covered by ERISA, which factors are not expressed within the scope or purview of ERISA. The number of recent cases which have been appealed to the federal circuit courts on the very same issue here[8] exemplifies the confusion and conflict that exists -- which will continue to exist unless this Court provides the overall guidance needed.

ERISA PREEMPTION CLAUSE

This Court has previously held that ERISA's preemption clause, 29 U.S.C. § 1144(a), broadly establishes as an area of exclusive federal concern the subject of every state law that "relates

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8. See, e.g., Kidder v. H & B Marine, Inc., No. 90-3340 (5th Cir. April 12, 1991) (1991 WL 77363); Gahn v. Allstate Life Ins. Co., 926 F.2d 1449 (5th Cir. 1991); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236 (5th Cir. 1990); Wickman v. Northwestern National Ins. Co., 908 F.2d 1077 (1st Cir. 1990); Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir.), cert. denied, 492 U.S. 906 (1989).

to" an "employee benefit plan." FMC Corp. v. Holliday, 111 S. Ct. 403 (1990); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). Further, this Court in Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58 (1987), held that an employee's state common law contract and tort claims arising from an insurer's termination of benefits under an "employee benefit plan" are preempted by ERISA.

As briefed below, because Brown was provided insurance through an "employee welfare benefit plan" as that term is defined in 29 U.S.C. § 1002 (1991), all of Brown's state common law contract and tort claims asserted herein are preempted.

1. An "Employee Welfare Benefit Plan" Exists as a Matter of Law

ERISA defines an "employee welfare benefit plan" as follows:

> any [1] plan, fund, or program which was heretofore or is hereafter; [2] established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained; [3] for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits in the event of sickness, accident, disability, [or] death . . .

ERISA Section 3(1), 29 U.S.C. Section 1002(1) (emphasis added).[9] Petitioner is entitled to judgment in this case because, as a matter law, (1) a plan was established, (2) by an employer, (3) through the purchase of insurance benefits.

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9. Congress intended the statutory provisions of ERISA to be "liberally construed" to cover all employee benefit plans not expressly exempted. See, e.g., H. Conference Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5038-39. See also Bell v. Employee Security Benefit Ass'n., 437 F. Supp. 382, 392 (D. Kansas 1977) ("it is obvious from § 1002(4) that Congress intended to give as broad a definition as possible to EBPs" . . . (i.e., employee benefit plans)).

A. **THE INSURANCE TRUST IS A "PLAN, FUND OR PROGRAM" FOR PURPOSES OF ERISA**

A plan, fund or program under ERISA is established if "from the surrounding circumstances a reasonable person can ascertain [1] the intended benefits, [2] a class of beneficiaries, [3] the source of financing and [4] procedures for receiving benefits." Donovan v. Dillingham, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc). See also Scott v. Gulf Oil Corp., 754 F.2d 1499, 1504 (9th Cir. 1985).

In this case, the Insurance Trust was established pursuant to the Agreement and Declaration of Trust, as attached hereto as Appendix "J" ("Declaration of Trust"), which, in addition to the "Group Policy" and "plan booklets" discussed hereafter, set forth

all of the above-quoted requirements for an employee welfare benefit plan:

(a) **Intended Benefits**. Article I of the Declaration of Trust identifies the intended benefits of the Insurance Trust as being the provision of "life and accident and health insurance" through "one or more group policies issued by insurance carriers." (Appendix J-2; Richey Ex. 2, p. 1.)

(b) **Intended Class of Beneficiaries**. Article I of the Declaration of Trust identifies the intended class of beneficiaries of the Insurance Trust as being "employees of employers and members of families of employees." The term "employees" shall comprise "employees of employers, and proprietors and partners whenever an employer is a proprietorship or a partnership, if such proprietors and

partners are actively engaged in and devote a substantial part of their time to the conduct of the business of the employer and the Trustees and their employees." (Appendix J-2; Richey Ex. 2, p. 1.) Finally, the "Group Policy" issued by Prudential to the Insurance Trust (Policy No. G-81780) requires that only those who are "primarily engaged in the repair and servicing of automobiles" may participate under the Group Policy. (Richey Ex. 13)

(c) **Source of Financing**. Articles III and IV of the Declaration of Trust establish the source of financing for the Insurance Trust in that "a corporation, proprietorship or partnership that is accepted as a Subscriber shall thereafter make payments on such dates and in such amounts as the Trustees shall require

for providing the insurance" and further, that "each Subscriber may require contributions from his insured employees." (Appendix J-5, 6; Richey Ex. 2, p. 2.) The Declaration of Trust also provides for the proper "use(s) of the funds" (e.g., pay premiums, make refunds, pay all necessary expenses) (Appendix J-7, Richey Ex. 2, p. 3.)

(d) **Procedures for Receiving Benefits**. Article II of the Declaration of Trust authorizes the trustees of the Insurance Trust to procure suitable insurance policies, "to take any action with respect to each policy for the insurance provided thereunder permitted by the insurance carrier," and to agree with insurance carriers that a representative of the trustees may "sign drafts upon the insurance carrier in the amounts approved for the payment of

claims under a policy," thereby facilitating "short method claim administration." (Appendix J-3; Richey Ex. 2, pp. 1-2.) Article III, Section 4 authorizes the trustees to "adopt such rules and regulations including any requirements for eligibility of Subscribers for participation in the Trust and require the Subscribers to furnish such information as the Trustees deem necessary or advisable." (Appendix J-5, 6, 7; Richey Ex. 2, p. 3.) Through these provisions, Article II establishes the procedures for receiving benefits under the Insurance Trust. The Insurance Trust communicates those procedures more specifically to the IGA members and their employees by providing them with "plan booklets" published by the insurance carrier, which includes benefit schedules and procedures for

making and appealing claims and receiving benefits. (Richey Depo. pp. 75-76; Richey Ex. 12.) See Holcomb v. Pilot Life Ins. Co., 754 F.Supp. 524, 527 (S.D. Miss. 1990) (court used "plan booklet," in part, to determine the source of financing, the beneficiaries, the intended benefits, and the procedure for receiving benefits).

Of most significance, the "Group Policy" (referred to on p. 23, supra) issued by Prudential to the IGA, sets out in considerable detail the intended benefits, class of beneficiaries, source of financing and procedures for receiving benefits. (Richey Ex. 13).[10]

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10. The "Group Policy" describes, in part, the intended benefits as "term life, accidental death and dismemberment, major medical, and supplemental accident insurance"; the intended class of beneficiaries as "all Employees of the Employer who are within the coverage classes under one or more Coverage Schedules"; the source of financing as "payable by the Policy-holder" with express limitations on the amount that an employee may contribute; and procedures (continued...)

See also Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 240 (5th Cir. 1990) (court focussed on "group policy" to determine the intended benefits, the class of beneficiaries, the source of financing and means of receiving benefits).

Finally, the Insurance Trust has filed its Declaration of Trust and its Annual Returns (Form 5500 Dept. of Treasury) with the United States Government for the purpose of complying with ERISA. (Richey Depo. pp. 17-18; Richey Ex. 5-9) The Insurance Trust itself considers the Declaration of Trust to be "the plan" for purposes of ERISA. (F.S. Tr. 1173-74, 1182-87; Richey Depo. pp. 17-18; Richey Ex. 2) See Kanne v. Connecticut General Life

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10. (...continued)
for receiving benefits as paid according to the detailed schedule contained within the Group Policy. (Richey Ex. 13)

Ins. Co., 859 F.2d 96, 99 (9th Cir. 1988), cert. denied, 492 U.S. 906 (1989) (the court found it significant that the "plan" submitted by the insurance company described and considered such plan as an ERISA plan).

Thus, according to the Declaration of Trust, the "plan booklets," and the "Group Policy,"[11] and in satisfaction of the above-quoted requirements for an "employee welfare benefit plan," the Insurance Trust constitutes a "plan, fund, or program," under ERISA. 29 U.S.C. § 1002(1). Donovan v. Dillingham, 688 F.2d at 1372.

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11. The Declaration of Trust, the "plan booklets" and the "Group Policy" were all made a part of the record below. See Richey Ex. 2, 12 and 13.

B. **THE INSURANCE TRUST WAS ESTABLISHED AND/OR MAINTAINED BY AN "EMPLOYER" FOR PURPOSES OF ERISA**

Pursuant to Section 3(5) of ERISA, an "employer" is defined as:

> any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis added). Here, the Insurance Trust was established and maintained by an employer, as required by Section 3(1) of ERISA, because the Declaration of Trust was adopted by the IGA and by each of the Adopting Members, including Brown's employer, Sonny's Automatic Transmission Service. (S.F. Tr. 666, 668, 703, 709; Richey Ex. 2; Richey Depo. pp. 34, 35, 37, 38) Therefore, both Brown's employer, and alternatively, the IGA, is an "employer" for purposes of ERISA.

1. **Sonny's Automatic Transmission Service Constitutes an "Employer" for Purposes of ERISA**

Each benefit program provided by an employer for his employees, to the extent that it meets the "plan" definition under ERISA Section 3(1), is considered an "employee welfare benefit plan." Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. Apr. 12, 1991) (1991 WL 77363); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 241-42 (5th Cir. 1990); Foxworth v. Durham Life Ins. Co.; 745 F. Supp. 1227, 1230 (S.D. Miss. 1990). See also Dep't of Labor Op. Ltr. 89-19A (Aug. 12, 1989) ("each employer which has elected to provide benefits described in 3(1) to its employees through the Trust has

established its own separate benefit plan subject to Title I of ERISA").[12]

At all times material to this lawsuit, Brown's employer, Sonny's, provided health insurance for its employees through the Insurance Trust, and such health insurance was provided by a group medical insurance policy with Prudential. (S.F. 666, 668, 703, 709; Richey Depo. pp. 34, 35, 37, 38, 81, 82) Such insurance was provided and paid for by Sonny's on behalf of Brown as an employee benefit.[13] (Richey Depo. pp.

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12. There are numerous, additional DOL opinion letters which state that employers, who provide and purchase insurance for employees through a trust, establish their own separate plan. See, e.g., Dep't of Labor Op. Ltr. 89-13A (July 20, 1989); Dep't of Labor Op. Ltr. 84-31A (July 9, 1984); Dep't of Labor Op. Ltr. 84-41A (Oct. 26, 1984); Dep't of Labor Op. Ltr. 84-47A (Dec. 5, 1984); Dep't of Labor Op. Ltr. 83-14A (March 14, 1983).

13. At trial, Brown testified that Sonny's "purchased" Brown's health and medical insurance "as an employee benefit." (S.F. Tr. 668). Further, the "Group Policy" which covered Brown limited the amount that any employee could contribute toward the payment of their insurance. (Richey Ex. 13)

81, 82; S.F. Tr. 668) Neither Brown, nor any employee of the IGA's Adopting Members, could independently obtain or purchase this insurance.[14] (Richey Depo. p. 34.) Thus, as an "adopting member," Brown's employer established an individual "plan" under ERISA. Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. April 12, 1991) (1991 WL 77363); Memorial Hospital System v. Northbrook Life Ins. Co., 904 F.2d 236, 241-42 (5th Cir. 1990); Foxworth v. Durham Life Ins. Co., 745 F. Supp. 1227, 1230 (S.D. Miss. 1990).

The Texas Fourteenth Court of Appeals below held that the Insurance Trust was not established nor maintained by a "statutory employer or employee

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14. Brown derived all insurance benefits from his employers' adoption of the Insurance Trust. There was no privity of contract between Brown and Prudential.

organization," as those terms are defined under ERISA, because:

1. Brown's employer, Sonny's Transmission, did not participate in the insurance trust's day to day operations or administration of the trust plan; and

2. Brown's employer did not own, control, administer or assume responsibility for the insurance policy or its benefits.

See Appendix A - 5 (emphasis added). In support of its holding, the Court cites only Taggart Corp. v. Life & Health Benefits Admin. Inc., 617 F.2d 1208, 1211 (5th Cir. 1980)., cert. denied, 450 U.S. 1030 (1981).

The Fourteenth Court of Appeals has decided an important question of federal law which directly conflicts with three United States Courts of Appeals' decisions, but, which has not yet been decided by this Court:

> Whether an employer who purchases insurance for its employees through an insurance trust

establishes an "employee welfare benefit plan" if the trust meets the requirements under Section 3(1) of ERISA.

(a) **The Decision of the Fourteenth Court of Appeals Conflicts With Other Courts' Decisions**

In Memorial Hospital System v. Northbrook Insurance Co., 904 F.2d 236 (5th Cir. 1990), the Fifth Circuit Court of Appeals specifically held that an employer need not, as held by the Fourteenth Court of Appeals, administer or assume responsibility for the insurance policy in order to constitute an "employer" under Section 3(5) of ERISA. Id. at 242.

In Memorial Hospital, an employer purchased and provided insurance and other health benefits to all of its employees through a multiple-employer insurance trust, similar to the trust in this case. In addressing ERISA

preemption, the Court in Memorial Hospital first held that there existed a "plan" as that term is defined under ERISA because according to the "group policy" at issue, a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of funding and the procedures for receiving benefits. Id. at 240. The Court then stated:

> By its express terms, ERISA encompasses welfare plans provided through the purchase of insurance 29 U.S.C. § 1002(1). Moreover, it is a common practice for employers to provide health care benefits to their employees through the purchase of a group health insurance policy from a commercial insurance company. See Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985). . . . Although we held in Taggart that the purchase of an insurance policy does not, in and of itself, establish the existence of an ERISA plan, we certainly did not hold . . . that an employer's purchase of health insurance offers no evidence of an intent to provide such a plan . . . . Unlike Taggart, the

> present case does not involve the bare purchase of insurance by a lone employee through a MET [Multiple Employer Trust]. [The employer] has chosen to provide welfare benefits to all of its full-time employees through the purchase of a group insurance policy. The fact that [the employer's] administrative functions are minimal is perfectly in keeping with its intent that the [insurance company] administer the plan as well as insure it. There is, thus, an employer-employee-plan relationship that was lacking in Taggart.

Id. at 240, 242 (emphasis added). See also Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489 (9th Cir.), cert. denied, 492 U.S. 906 (1989) ("the problem with Kannes' argument is their apparent assumption that [the employers'] function with respect to the plan determine ERISA coverage"); Kidder v. H&B Marine, Inc., No. 90-3340 (5th Cir. Apr. 12, 1991) (1991 WL 77363) (an individual employer who purchased insurance for his employees through a

multiple employer trust established an "employee welfare benefit plan" notwithstanding that the employer had no "active involvement in the maintenance or administration of the plan").

In applying these decisions, it is apparent that Sonny's, as an "employer", established an "employee welfare benefit" through its adoption of the Insurance Trust. First, there is no dispute that Brown's employer provided and purchased group insurance for all of its employees. (S.F. Tr. 666, 668, 703, 709; Richey Depo. pp. 34, 35, 37, 38, 81, 82) See Donovan v. Dillingham, 688 F.2d 1367, (11th Cir. 1982) ("the purchase of a group policy or multiple policies covering a class of beneficiaries offers substantial evidence that a plan fund or program has been established"). Second, group

insurance was provided and purchased through the Insurance Trust, very similar to the trust in Memorial Hospital and Kidder. (Richey Ex. 2) Finally, the Insurance Trust and the "Group Policy" provided a description of the intended benefits, a class of beneficiaries, a source of financing, and procedures for receiving benefits. (Richey Ex. 2; Richey Ex. 13) Thus, Brown's employer established an "employee welfare benefit plan" under ERISA.

Contrary to the Fourteenth Court of Appeals' decision below, Petitioner need not prove that the individual employers had an "active involvement" in the operations or administration of the trust or plan. This additional requirement of active involvement which the Fourteenth Court of Appeals adopted

from the Taggart decision discussed below, is misplaced, unsupported and conflicts with the overwhelming majority of case law on this issue.

(b) **The Taggart Decision is Inapposite to the Present Action**

Both the Texas Fourteenth Court of Appeals and the trial court, in its Findings of Fact and Conclusions of Law, relied exclusively on one decision in addressing ERISA preemption, Taggart Corp. v. Life and Health Benefits Admin. Inc., 617 F.2d 1208, 1211 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981). Taggart, however, has no application in determining whether Brown's employer established an "employee welfare benefit plan" for its employees.

The Taggart case involved a company comprised of one employee who

purchased insurance for himself and his family while attempting to characterize his insurance as a group health plan. Taggart, 617 F.2d at 1210. There was, therefore, an "employer-employee-plan relationship" that was lacking in Taggart. This lack of any "employer-employee-plan relationship" in Taggart was specifically recognized and addressed in both Memorial Hospital, 904 F.2d at 242, and Kidder, No. 90-3340 (5th Cir. April 21, 1991) 1991 WL 77363.[15]

In this case, however, there is no doubt that an "employer-employee-plan relationship" existed. It is undisputed that each employer of the IGA, including Brown's employer, purchased insurance benefits for and on behalf of its

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15. Both of these cases distinguished Taggart based on the lack of an "employer-employee-plan relationship" in Taggart.

employees through the insurance trust. Further, it was impossible for any single employee to purchase insurance on his own. (Richey Depo. p. 34)

The second factor distinguishing Taggart is that there was no intent by an employer in Taggart to provide benefits on any regular or permanent basis. In this case, on the other hand, Brown's employer provided a comprehensive insurance program to all of its employees through the Insurance Trust, which trust was to continue for twenty-one years from the date the trust was executed. (Appendix J-13.)

As stated recently by the First Circuit in Wickman v. Northwestern National Ins. Co., 908 F.2d 1077 (1st Cir. 1990):

> The crucial factor in determining if a "plan" has been established is whether the purchase of the insurance policy constituted an

> expressed intention by the employer to provide benefits on a regular and long term basis. Significantly, there was no indication of a long term commitment in Taggart, where it appears the benefits, what little they amount to, had no sense of permanence.

Id. at 1083 (emphasis added).

In synopsis, Brown's employer, Sonny's, is a statutory "employer" under Section 3(5) of ERISA. Brown's employer purchased insurance benefits for its employees through the Insurance Trust--thereby establishing an "employer-employee-plan relationship." Memorial Hospital, 904 F.2d at 242. Further, Brown's employer expressed an intent, through subscription to the Insurance Trust, to provide benefits on a regular and long term basis. Wickman, 908 F.2d at 1082. Because Sonny's established an "employee welfare benefit plan", all of Brown's claims are preempted.

2. **The IGA Constitutes an "Employer" for the Purpose of ERISA**

Alternatively, Prudential maintains that the IGA is a statutory employer under Section 3(5) of ERISA.

There is no dispute that the Insurance Trust was created by the IGA through a written Agreement and Declaration of Trust. (Richey Ex.2 pp. 1-3; F.S. Tr. 1182-87) The IGA was a party to the Agreement and Declaration of Trust and the Trust itself was referred to as the "Independent Garagemen's Association Trust." (Richey Ex. 2, pp. 1-2) See Dep't of Labor Op. 81-76A (Oct. 14, 1981) (an important factor in determining whether an organization has established an "employee welfare benefit plan" is whether the organization is a party to the trust agreement). The IGA created the Insurance Trust for the purpose of

obtaining major medical and life insurance for the employees of member employers of the IGA. (Richey Ex. 2, p. 1)

The Fourteenth Court of Appeals below based its holding with respect to ERISA on the determination that the Insurance Trust was not established nor maintained by an "employer." This conclusion, however, wholly fails to recognize that the term "employer" includes a "group or association of employers" such as the IGA.

Pursuant to Section 3(5) of ERISA, an "employer" is defined as:

> any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

29 U.S.C. § 1002(5) (emphasis added). Without question, the IGA is a "group or

association of employers" which acted for Brown's employer in establishing and maintaining the Insurance Trust. Thus, the IGA is an "employer" for purposes of ERISA.[16]

(a) **The IGA is a "Cognizable Group or Association of Employers With an Organizational Relationship"**

There are two main factors which courts, as well as the Department of Labor, have utilized in determining whether an entity, such as the IGA, constitutes a "group or association of employers acting for an employer" for

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16. In its brief to the Court of Appeals, Respondent Brown argued that Prudential has raised a "new theory" on appeal by now claiming that the IGA is an "employer" as compared to "an employee organization." See p. 14 of Appellees Brief. Brown fails to recognize that during the separate trial on ERISA preemption, Prudential specifically argued that the IGA is both an "employer" and "employee organization" as those terms are defined by ERISA. (E.P. Tr. pp. 49-53). Moreover, Prudential's claim herein is based on an assertion that Brown's causes of action are preempted by ERISA and Prudential has consistently asserted such a claim in both the trial court, Fourteenth Court of Appeals and the Texas Supreme Court.

purposes of ERISA. First, the entity must be a "cognizable, bona fide group or association of employers" with "some organizational relationship among them." See Credit Managers Ass'n of Southern California v. Kennesaw Life & Accident Ins. Co., 809 F.2d 617, 625 (9th Cir. 1987); Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984).

The purpose of this requirement is to prevent "unrelated" employers who execute identically worded trust agreements offered by entrepreneurial, independent third parties from being classified as a "group or [an] association of employers." See Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984). Typically, such an independent third party is one acting as a "middleman" seeking to profit from the unrelated employers by providing them group

insurance at reduced rates; thus, it is not acting "in the interest of" or on behalf of the employer subscribers. See Wisconsin Educ. Ass'n Ins. Trust v. Iowa State Bd. of Puls. Instruction, 804 F.2d 1059, 1063 (8th Cir. 1986).

In applying this definition, it is apparent that the IGA is a "cognizable, bona fide group or association of employers" because the IGA is a non-profit trade organization composed of only those who are employers in the automotive repair business. (Richey Deposition pp. 11-13, 44, 47) The IGA has the common interest of providing information and support to its members in the automotive repair business, which interest is unrelated to the provision of welfare benefits. The IGA is governed by the IGA by-laws, which dictate the organizational

structure of the IGA and mandate that only employers of the automotive repair business may belong to the IGA (Richey Deposition p. 46-47).

Courts have routinely held that trade organizations or other non-profit associations such as the IGA, are to be considered as "employers" or as a "group or association of employers" for purposes of ERISA. See, e.g., Twin City Pipe Trades Service Ass'n. v. Plaas Plumbing & Heating Co., 815 F.2d 58, 59 (8th Cir. 1987); Minnesota Chamber of Commerce & Industry v. Hatch, 672 F. Supp. 393, 395 (D. Minn. 1987); California Chamber of Commerce v. Simpson, 601 F. Supp. 104, 106 (C.D. Cal. 1985).[17]

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17. In its attempt to distinguish the numerous cases which have held that a trade association, such as the IGA, may be considered as a "cognizable group or association of employers" for purposes of ERISA, Brown argued on appeal that the employers in the IGA lack a common (continued...)

Therefore, because the IGA is a trade association of employers with the common relationship of working as employers in the (i.e., not an entrepreneurial third party), the IGA is a "cognizable group or association of employers" for purposes of ERISA. See Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984) (the fact that each participating employer in an association is involved

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17. (...continued)
relationship because the trust agreement itself does not limit its subscribers to those who are in the business of automobile repair. Prudential has provided conclusive, undisputed evidence which shows that "only employees of IGA members can obtain benefits under the trust." See Richey Deposition pp. 33-36. Moreover, it is well-settled that even absent "express terms" of the trust plan which provide that the plan was established to provide benefits to only employees of sponsoring companies, the "surrounding circumstances" can establish that the plan was operated to provide benefits to only those who were employees of the sponsoring companies. Freund v. Marshall & Ilsley Bank, 485 F. Supp. 629, 634 (W.D. Wis. 1979). In this case, the group policy issued by Prudential requires that only employees who are "engaged in the repair and servicing of automobiles" may participate. (Richey Ex. 13, p. 3) Thus, because the "surrounding circumstances" make clear that only employees of members of the IGA can participate in the Trust, Brown's argument fails as a matter of law.

in the "building industry" supports the conclusion that the association is a "cognizable, bona fide group" for purposes of ERISA); Dep't of Labor Op. Ltr. 83-48A (Sep. 14, 1983) (an organization composed of employers from the "banking industry" supports the conclusion that such organization is a "cognizable, bona fide group of employers").

(b) The IGA and Its Employer Members Exercise Control Over the Trust Insurance

The second factor used in determining whether a trust plan has been established and maintained by a "group or association of employers acting for an employer" is whether the association or employers within the association (i.e., Brown's employer) exercise control, either "directly or indirectly," over the Trust. See

Insurance & Prepaid Benefits Trust v. Marshall, 90 F.R.D. 703 (C.D. Cal. 1981); Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984); Dep't of Labor Op. Ltr. 83-48A (Sep. 14, 1983); Dep't of Labor Op. Ltr. 80-42A (Jul. 11, 1980).

The purpose of this factor is to ensure that the alleged "group or association" is one which acts in the interest of the employer members in relation to the trust plan. If, on the other hand, an independent third party (i.e., an insurance company) completely controls the trust, the alleged "group or association" cannot act in the interest of or on behalf of the employers in relation to such trust.

In the case of Insurance & Prepaid Benefits Trusts v. Marshall, 90 F.R.D. 703 (C.D. Cal. 1981), the court addressed whether a particular group

could be considered as "a group or association of employers acting for an employer" in its providing of health and life insurance to employees under a trust plan.

The sole issue before the court in Marshall was whether the trust was established or maintained by "a group or association of employers acting for an employer" under ERISA and thus, whether the trust was an "employee welfare benefit plan." In addressing this issue, the court held that there existed an "association of employers" which had established the trust and stated that the important factor in determining whether the trust was maintained by the association of employers, is whether the association is the true "decision making body" of the Trust which "exercises control" over the Trust. Id.

The court in Marshall then identified two factors in determining the existence of "control" in a trust relationship:

> (1) the trustees are representatives of the participating employers; and
>
> (2) the trustees are the true decision making body, independent and distinct from the insurance company.

Id. (emphasis added).

Further, the Department of Labor ("DOL") has issued numerous opinion letters which address the factors used to determine control in a trust relationship. For example, the DOL has stated:

> the employers that participate in a benefit program must, either directly or indirectly, exercise control over that program, both in form and in substance, in order to act as a bona fide employer group or association with respect to the program. [T]he circumstances that tend to support a conclusion that the Trust was maintained by a bona

> fide employer group or association [are that] . . . the participating employers by virtue of their authority to elect a majority of the [trustees], appear to exercise control and direct the activities and operations of the benefit program.

Dep't of Labor Op. Ltr. 83-48A (Sept. 14, 1983).

Moreover, the DOL recognizes that a cognizable "group or association" exercises direct and/or indirect control over a trust plan if:

> The association . . . is given the authority to amend or terminate the Trust and to replace the trustees.

Dep't of Labor Op. Ltr. 84-23A (May 23, 1984) (emphasis added). See also Dep't of Labor Op. Ltr. 84-29A (June 26, 1984) (an association of employers indirectly exercises control over the trust if the association has the authority to elect trustees); Dep't of Labor Op. Ltr. 84-11A (Feb. 22, 1984) (by virtue of their

authority and power to elect trustees of the trust, the association appears to exercise control and direct the activities and operations of the Trust benefit program).

In applying these factors, it is apparent that the IGA and its participating employers exercise both direct and indirect control over the Insurance Trust benefit program. First, the four-member board of trustees of the Insurance Trust are all independent automotive service employers who belong to the IGA and have been active in the IGA since its inception. Accordingly, the trustees are representatives of the IGA and employers of the IGA. (Richey Depo. pp. 32, 88) Second, the trustees are vested with authority to administer the trust, to select the appropriate insurer, and to control the Trust Fund.

(Richey Ex. 2, pp. 2-4) Third, according to the terms of the Agreement and Declaration of Trust, the IGA has control over the Insurance Trust by its powers to remove trustees, to appoint successor trustees and to terminate the Trust. (Richey Ex. 2, pp. 4-5) Fourth, the IGA has the concurrent power to administer the Trust if called upon by the trustees to do so. (Richey Ex. 2, p. 4) Finally, the employer members of the IGA exercise direct control over the Insurance Trust by deciding which deductible will apply to its employees. (Richey Depo. p. 77)

Therefore, based on the express terms of the Insurance Trust and the uncontroverted evidence adduced at trial, this Court should find, as a matter of law, that the IGA and the employer members of the IGA exercise

control, both in form and in substance, over the Insurance Trust. Accordingly, the IGA is a "group and/or association of employers" which established and maintained the Insurance Trust for the IGA members' employers. Thus, the IGA is an "employer" for purposes of ERISA preemption.

C. THE INSURANCE TRUST WAS ESTABLISHED AND MAINTAINED FOR THE "PURPOSE OF PROVIDING INSURANCE BENEFITS"

Included within the statutory definition of an "employer welfare benefit plan" is

> any plan fund or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical or hospital care benefits . . . ."

ERISA Section 3(1), 29 U.S.C. § 1002(1).

The Insurance Trust in this action clearly qualifies as an "employee

welfare benefit plan" because it was established by the IGA to provide life, accident and health insurance for the IGA's members' employees. (Richey Depo. pp. 9-10; Richey Ex. 2, p. 1) According to the Declaration of Trust:

> The purpose of the Trust is to establish and maintain the Fund to provide life and accident and health insurance for employees of [member] employers.

See Richey Ex. 2, p. 1. (emphasis added).

Because the purpose of the Insurance Trust is to provide life, accident and health insurance to the employees of IGA members, the Insurance Trust is an "employee welfare benefit plan" pursuant to Section 3(1) of ERISA. Such Insurance Trust Plan was established and maintained by Brown's employer, Sonny's Automatic Transmission Service, and the IGA.

D. THE INSURANCE TRUST AND ITS EMPLOYER MEMBERS AFFECT INTERSTATE COMMERCE

The Insurance Trust is an "employee welfare benefit plan" under ERISA that was established and maintained by an "employer" engaged in commerce or in an industry or activity affecting commerce. ERISA Section 4(a), 29 U.S.C. Section 1003(a). The Insurance Trust affects interstate commerce and is not exempt from ERISA.

A welfare plan affects interstate commerce if it is "established and maintained (1) by an employer engaged in commerce or in any industry or activity affecting commerce." ERISA Section 4(a); 29 U.S.C. § 1003(a). The IGA members, and consequently their participants in the Insurance Trust, are independent automotive repair shops and their employees are located in the

United States and several foreign countries. (Richey Depo. pp. 33-34, 48-50) Additionally, Sonny's Automatic Transmission Service, the IGA, and the Insurance Trust, use interstate mail and telephone lines in performing services for the IGA members' employees in Texas and other states. (Richey Depo. pp. 46, 89-91) See Cadillac Ins. Co. v. L.P.C. Distributing Co., 770 S.W.2d 892 (Tex. App.--San Antonio 1989, writ denied). Accordingly, the IGA, Sonny's, and the Insurance Trust operate in, and have an effect upon, interstate commerce.

1. **Because The Insurance Trust is an "Employee Welfare Benefit Plan" Established by an "Employer," All of Brown's Claims are Preempted Under ERISA**

In his petition, Brown alleged breach of contract, breach of the duty of good faith and fair dealing, and gross negligence, all of which are state

law claims and thus preempted by ERISA. (S.F. Tr. 34-40) Gorman v. Life Insurance Co. of North America, No. C-7806 (Tex. March 27, 1991) (1991 WL 7964) (claims against insurance company for breach of contract, breach of good faith and fair dealing and breach of duty based on an "employee welfare benefit plan" are preempted by ERISA).

Brown had the burden of pleading, proving and requesting findings on any ERISA cause of action. Tex. R. Civ. P. 278, 279; see also Felts v. Graphic Arts Employee Benefit Trust, 680 S.W.2d 891, 894 (Tex. App. -- Houston [1st Dist.] 1984, no writ). The transcript contains no such pleadings, no evidence was introduced to support an ERISA cause of action and no findings were requested in support of such cause of action.

At a post-verdict hearing on March 31, 1989, the trial court granted Brown leave to file, in the alternative to his state law claims, a trial amendment raising claims under ERISA. Brown, however, chose not to do so. Therefore, Prudential is entitled to judgment, as a matter of law, based on ERISA preemption. Cathey v. Metropolitan Life Ins. Co., 805 S.W.2d 387 (Tex. 1991) (affirming lower court's dismissal of state law claims based on ERISA preemption when plaintiff's "were offered the opportunity to amend their petition to assert an ERISA cause of action, but expressly refused to do so").

2. Policy

Brown's employer and all of the employee members of the IGA should be given the adequate security that their

plan (i.e., Insurance Trust) is protected by ERISA and that there will be no unnecessary litigation in determining or applying conflicting law. Moreover, this Court's holding will have policy effects far beyond the scope of the dispute between Prudential and Billy Brown. By refusing to recognize Brown's employer or the IGA as an ERISA "employer" which established the benefit plan at issue, this Court will deprive the employees of small businesses -- "mom and pop" businesses too small to obtain group insurance on their own -- of the overall protections that Congress intended ERISA to give them. ERISA will only protect the employee welfare benefit plans of those fortunate enough to work for larger companies, who do not have to band together through a trade association, such as the IGA, in order

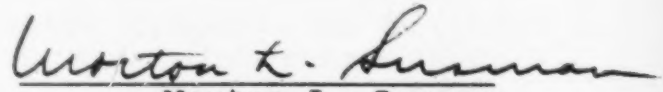
to obtain group insurance. That is directly contrary to the intent of Congress that ERISA is to be "liberally construed" to cover all employee benefit plans not expressly exempted. See, e.g., H. Conf. Rep. No. 1280, 93d Cong., 2d Sess. (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 4639, 5038, 5038-39.

Conclusion

WHEREFORE, Prudential Insurance Company of America, Petitioner, prays that a writ of certiorari issue from this Honorable Court to review the judgment of the Texas Fourteenth Court of Appeals below. If the petition is granted, Petitioner prays that the judgment of the Fourteenth Court of Appeals be reversed, and judgment rendered in favor of Prudential, or, in the alternative, remanded with

appropriate instructions to the trial court below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

4th I hereby certify that on the day of June, 1991, three (3) copies of the Petitioners' Petition for Writ of Certiorari were served by first class mail, postage prepaid, to Millard A. Johnson, 4500 First Interstate Bank, 1000 Louisiana, Houston, Texas 77002-5012, (713) 224-5771. All parties required to be served have been served. I am a member of the Bar of this Court.

Morton L. Susman

MORTON L. SUSMAN
Counsel of Record

Supreme Court, U.S.
FILED
JUN 4 1991
OFFICE OF THE CLERK

NO. 90-1884 (2)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Prudential Insurance Company
of America,

Petitioner,

v.

Billy W. Brown,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In The
Fourteenth Court of Appeals

NO. B14-89-00695-CV

PRUDENTIAL INSURANCE COMPANY OF AMERICA,
Appellant

V.

BILLY W. BROWN, Appellee

On Appeal from the 151st District Court
Harris County, Texas
Trial Court Cause No. 81-31687

OPINION

Prudential Insurance Company of America appeals from a judgment for breach of an insurance contract and breach of the duty of good faith and fair dealing rendered in favor of Billy W. Brown. Prudential brings eight

points of error, claiming (1) the trial court erred in granting the new trial; (2) the Employment Retirement Insurance Security Act ("ERISA") preempted Brown's claims; (3) the contract between Brown and his doctor was illegal; (4) the evidence was legally and factually insufficient to support the jury's findings of Brown's mental anguish; (5) the submission of two special issues permitted the jury to compensate Brown twice for the same element of damages; (6) the evidence was legally and factually insufficient to show that Prudential acted with conscious indifference to, or in reckless disregard of, Brown's rights; and (7) the trial court erred in excluding

material, admissible evidence offered by Prudential. We affirm.

In 1979, Brown was diagnosed with bladder cancer. Chemotherapy proved ineffective as a treatment against Brown's cancer. Brown then began a series of radiation treatments in preparation for surgery to remove his bladder and prostate gland. Without the surgery, the probability that Brown would die within five years was 85%. Prior to the surgery, Brown learned of Dr. Stanislaw R. Burzynski and alternative cancer treatments he was administering. Brown contacted Dr. Burzynski and began receiving treatment with a series of drugs called antineoplastons, which Dr. Burzynski had developed. Within six weeks of

beginning Dr. Burzynski's treatment, Brown was diagnosed by his urologist as being free from all bladder cancer. Over ten years later he has had no recurrence of bladder cancer.

At the time Brown received his treatment from Dr. Burzynski, he had group insurance with Prudential, which was purchased through the Independent Garagemen's Association Insurance Trust ("the insurance trust"). The insurance trust served as a conduit through which premiums were paid by various employers for the purpose of obtaining major medical and life insurance for the employer members of the Independent Garagemen's Association. Brown's claims to Prudential for Dr. Burzynski's treatment was forwarded by the insurance

trust to Prudential. Prudential denied Brown's claims on the grounds that the treatment was not reasonably medically necessary and, therefore, was not covered under the group insurance policy. Brown filed suit against Prudential for breach of its contract of insurance. Brown also alleged that Prudential had breached its duty of good faith and fair dealing. The case was originally tried on May 20, 1986. The jury verdict and judgment in the first trial were in favor of Prudential. Brown filed a motion for a new trial on the grounds of jury misconduct. The trial court granted Brown's motion and, on January 26, 1989, the case was tried again. The jury verdict and judgment in the second trial were in Brown's favor.

In its first point of error Prudential claims the trial court abused its discretion in granting Brown's motion for new trial because the record from the hearing on the motion does not show that an outside influence affected the jury's decision. Following the first trial, Brown filed a motion for new trial on the grounds that the jury had engaged in misconduct. The affidavits of the jurors showed that the jurors received outside influence from a newspaper article that stated that Dr. Burzynski was the subject of a federal grand jury probe and under court order not to ship his medications across state lines. The affidavit further alleged that jurors also received outside influence from a friend of one of the

members of the jury. That friend was a lawyer and told one of the members of the jury that Dr. Burzynski was a "quack" and that Prudential would win the case. The trial court granted Brown's motion for new trial and Prudential now attempts to appeal that ruling.

An order granting a new trial is not reviewable on appeal if, as here, the motion for new trial is timely filed and the court's order is made during its period of plenary jurisdiction over the judgment. Cummins v. Paisan Construction Co., 682, S.W.2d 235, 236 (Tex. 1984). We have no jurisdiction to consider this point. Hinote v. Local 4-23, 777 S.W.2d 134, 146 (Tex. App. --

Houston [14th Dist.] 1989, writ denied). Point of error one is overruled.

In his second and third points of error Prudential claims the trial court erred in not granting Prudential's motion for judgment notwithstanding the verdict because all of the state law claims pleaded by the plaintiff are preempted by ERISA, and in denying Prudential's motion to strike Brown's demand for jury trial because ERISA does not permit jury trials.

The Independent Garagemen's Association ("IGA") was an association composed of employers whose primary business was repair of automobiles. The IGA created an insurance trust for the purpose of obtaining major medical and life insurance for the employer members

of the association. Brown's employer, Sonny's Automotive Transmission Service, obtained Prudential insurance through the insurance trust. The insurance trust was created so the employers could obtain insurance at group rates. The trust's only duties were to send bills to the employers, accept premium payments, and distribute claims. Prudential paid the claims, but the trust administered them. Prudential determined the amount of the premiums to be charged to the employers. The employers had no input into the operation or administration of the trust or the selection of insurance.

Prudential argues that the insurance trust is an "employee welfare benefit plan" under ERISA and,

therefore, Brown's state law causes of action are preempted. ERISA preempts state common law actions based on the improper handling of a claim for benefits under an employees' group insurance policy. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987). The rationale for federal preemption of state causes of action covered by ERISA is to prevent trustees of plans from being subjected to the threat of conflicting and inconsistent federal and state regulations. Ames v. Ames, 776 S.W.2d 154 (Tex. 1989). ERISA regulates employee welfare benefit plans including group health insurance policies. ERISA defines an "employee welfare benefit plan" as:

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment[.]

29 U.S.C. § 1002(1).

The insurance trust involved in this case was neither established nor maintained by a statutory employer or employee organization, See 29 U.S.C. § 1002(4), 1002(5), and therefore, falls outside the scope of ERISA. Neither

Sonny's Transmission, nor any other employer, participates in the insurance trust's day-to-day operation or administration. The activities of the trust consist of transferring premium payments and claims between the employees and the insurance companies. ERISA does not regulate "bare purchases" of health insurance where, as here, the purchasing employer neither directly nor indirectly owns, controls, administers, or assumes responsibility for the policy or its benefits. See Taggart Corp. v. Life and Health Benefits Admin. Inc., 617 F.2d 1208, 1211 (5th Cir. 1980). Because the trust cannot be considered an employee welfare benefit plan, ERISA does not preempt Brown's state law

causes of action. Points of error two and three are overruled.

In its fourth point of error Prudential claims the trial court erred in not granting Prudential's motion for judgment notwithstanding the verdict because the underlying contract between Brown and Dr. Burzynski and Burzynski research institute was illegal. Prudential argues that, because antineoplastons had not been approved by the Food and Drug Administration ("FDA") before Dr. Burzynski administered them to Brown, the contract between Brown and Dr. Burzynski was illegal and that, as a matter of public policy, Prudential should not pay for the use of drugs that are not approved by the FDA.

Prudential's argument fails for two reasons. First, the illegality defense does not prevent Brown from recovering on his contract with Prudential. The contract sued on is the insurance contract, not the contract between Brown and Burzynski.

Second, Prudential did not incorporate the public policy it now urges when it drafted its contract with Sonny's Transmission. The insurance contract could have precluded payment for illegal drugs or experimental drugs, or provided that all drugs must have been declared safe and effective by the FDA before they would be covered expenses under the contract. See McLaughlin v. Connecticut General Life Ins. Co., 565 F. Supp. 434, 449 (N.D.

Ca. 1983). Where the terms of an insurance policy are plain, definite, and unambiguous, the courts cannot vary those terms. Gulf Atlantic Life Ins. Co. v. Disbro, 613 S.W.2d 511, 512 (Tex. Civ. App. -- Beaumont 1981, no writ). The policy provides that Prudential will not cover "charges for any service or supply not reasonably necessary for the medical care of the patient's sickness or injury." That is the exclusion under which Prudential attempted to deny coverage. The policy does not exclude charges for drugs not approved by the FDA. Point of error four is overruled.

In its fifth point of error Prudential claims the trial court erred in submitting special issues 3 and 4 to the jury because there was no evidence

or insufficient evidence of mental anguish suffered by Brown. An objection to an issue that the evidence is factually insufficient to support the submission of the issue does not preserve factual insufficiency of the evidence for our review. Further, Prudential failed to file a motion for new trial that challenged the factual sufficiency of the evidence. See Tex. R. Civ. P.324b. Therefore, our review is limited to the legal sufficiency of the evidence.

With regard to legal insufficiency points, we will consider only the evidence tending to support the finding, viewing it in the most favorable light in support of the finding, giving effect to all reasonable

inferences that may properly be drawn therefrom and disregarding all conflicting evidence. Garza v. Alviar, 395 S.W.2d 821, 823 (Tex. 1965).

A plaintiff can establish the existence of pain and suffering by circumstantial evidence. Landreth v. Reed, 570 S.W.2d 486, 489 (Tex. Civ. App. -- Texarkana 1978, no writ). The courts presume pain and suffering and mental anguish naturally accompany a severe physical injury. Griffith v. Casteel, 313 S.W.2d 149, 152 (Tex. Civ. App. -- Houston 1958, writ ref'd n.r.e.). Because of its nature, the existence of pain and suffering and mental anguish is not capable of being accurately determined and, accordingly, there is no fixed rule or standard for

its measurement. Thus, the degree must be left to the sound judgment of the jury, subject only to correction by the courts for abuse and excessiveness. Landreth v. Reed, 570 S.W.2d at 489.

Brown testified that he was "upset" with the way Prudential handled his claim. He said he had seen inter-office memos that showed how Prudential tried to deny his claim. He also was afraid he might have to sell his family farm to pay his bills. Further, when he was in the hospital, he was not released at the time he was supposed to be released because he could not pay the bill, and Prudential refused to pay it. We conclude there was legally sufficient evidence to show Brown suffered mental anguish as a result of Prudential's

refusal to pay his claim. Point of error five is overruled.

In its sixth point of error Prudential claims the trial court erred in submitting special issues 2 and 5 because the submission of both issues permitted the jury to compensate Brown twice for the same element of damages, i.e., mental anguish from Prudential's claims handling decisions.

Question 2 asked the jury if Prudential breached the duty of good faith and fair dealing it owed to Brown. Question 5 asked the jury if Prudential unreasonably delayed in communicating its denial of Brown's claim. Prudential argues that Question 5 is merely a phase or shade of Question 2. Prudential did not object to Question 2, or Question 5

on the grounds that one was a phase or shade of the other. Therefore, Prudential has waived point of error six. Chrysler Corp. v. Roberson, 619 S.W.2d 451, 459 (Tex. Civ. App. -- Waco 1981, no writ); Tex. R. Civ. P. 274.

In its seventh point of error Prudential claims the trial court erred in submitting special issue number 8 to the jury because there was no evidence of Prudential's alleged "conscious indifference to, or reckless disregard of Brown's rights or welfare." Question 8 asked the jury if Prudential's failure to act fairly and in good faith toward Brown demonstrated a conscious indifference to, or reckless disregard of his rights or welfare.

Clinton Miller, an expert in insurance bad faith litigation, testified that, based on his review of Prudential's claim file, Prudential did not meet the standard in the industry for the handling of Brown's claim. An internal memo stated that Prudential needed "a little more to base [its] rejection on rather than the standard exclusion 'charges . . . not reasonably necessary . . . etc.'" Miller testified that the adjuster who wrote the memo did not have a reasonable basis to reject the insured's medical bills. Miller testified that the standard in the industry, due to the superiority of the insurance company in the bargaining process, is that, the policy is construed in favor of the insured. If

the insurance company discovers that a treatment has cured the insured, it should pay the insured's claims. Prudential, in trying to recoup money it had already paid to Brown for this treatment, deducted $1,415 from benefits they had already paid Brown. Prudential deducted the $1,415 while Brown was in the hospital. He could not leave the hospital until he paid the money out of his own funds. This action did not meet the industry standard and, in Miller's opinion constituted bad faith.

Later, Prudential claimed they were not going to pay Brown because his treatment was "experimental in nature." There was, however, no exclusion in Brown's policy for experimental treatment. Prudential paid claims to

other patients who were undergoing the same treatment from Dr. Burzynski. Prudential took from February 1980 to May 30, 1980 to send a denial letter to Brown. This four month delay was unreasonable in Miller's opinion. The denial letter sent to Brown stated three to four exclusions that were not included in Brown's policy. The letter denied the claim on the basis that "the service or supply must not be educational or experimental in nature." That exclusion was not included in Brown's policy. We find this is sufficient evidence to support the finding that Prudential acted with conscious indifference to, or in reckless disregard of Brown's rights or

welfare. Point of error seven is overruled.

In its eighth point of error Prudential claims the trial court erred in excluding the testimony of Glenda Steed and Dr. Emil J. Freireich and testimony contained in the bills of exceptions from Dr. Stanislaw R. Burzynski and Angelina Wise. The testimony offered by Prudential from Glenda Steed and Dr. Emil Freireich, and the bills of exceptions from Angelina Wise and Dr. Burzynski are hearsay within the definition of Tex. R. Civ. Evid. 801. The testimony Prudential attempted to offer came from testimony at the first trial. The testimony of a witness at a former hearing is not admissible, unless there is a showing by

the proponent of the evidence that the witness is unavailable. Tex. R. Civ. Evid. 804.

The requirement of unavailability in rule 804 establishes a preference for testimony, indicating that the particular indicia of trustworthiness in the exceptions are regarded as inferior to the testimonial conditions. Welborn, Article VIII: Hearsay, 20 Hous. L. Rev. 445, 538 (1983 Tex. R Evid. Handbook). Rule 804(a) names five separate grounds that suffice to constitute unavailability: (1) a claim of privilege; (2) refusal to testify; (3) lack of memory; (4) death or physical or mental illness or infirmity; (5) absence from the hearing and inability of the proponent to

procure his declarant's attendance or testimony by process or other reasonable means. Prudential did not demonstrate unavailability through any of these means. Point of error eight is overruled.

The judgment of the trial court is affirmed.

/s/ Joe L. Draughn

Justice

Judgment Rendered and Opinion filed August 9, 1990.

Panel Consists of Justices Sears, Cannon and Draughn.

Do Not Publish - TEX. R. APP. P.90.

[Entered April 3, 1989]

NO. 81-31687

BILLY W. BROWN,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	HARRIS COUNTY,
	§	T E X A S
PRUDENTIAL	§	
INSURANCE COMPANY	§	
OF AMERICA,	§	
	§	151ST JUDICIAL
Defendant	§	DISTRICT

FINAL JUDGMENT

BE IT REMEMBERED that on the 26th day of January, 1989, the above entitled and numbered cause came on to be heard for trial. Plaintiff Billy W. Brown appeared in person and by way of his counsel of record Millard A. Johnson, Calvin, Dylewski, Gibbs, Maddox, Russell & Verner, P.C. Defendant The Prudential Insurance Company of America appeared by and

through its counsel of record William J. Dyer, Weil, Gotshal and Manges, and Kathryn Page, Baker & Botts. All parties announced ready for trial. A jury of twelve men and women, good and true, was duly sworn and impanelled.

After having heard the evidence adduced by each party at trial, and having heard the arguments of counsel thereupon, on February 20, 1989, the jury returned its unanimous verdict, including the following answers to the written questions submitted to the jury by this Court:

QUESTION NO. 1.

Did Prudential breach its contract of insurance with Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 2.

Did Prudential breach the duty of good faith and fair dealing it owed to Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 3.

Was Prudential's breach of the duty of good faith and fair dealing a proximate cause of mental anguish to Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 4.

What sum of money if paid now in cash, would reasonably compensate Billy W. Brown for the mental anguish he has suffered, if any, because of Prudential's breach of the duty of good faith and fair dealing, if any?

ANSWER: $65,000.00.

QUESTION NO. 5.

Did Prudential unreasonably delay in communicating its denial of Billy W. Brown's claim?

ANSWER: Yes.

QUESTION NO. 6.

Was such unreasonable delay by Prudential, if any, a proximate cause of damages to Billy W. Brown?

ANSWER: Yes.

QUESTION NO. 7.

What sum of money if paid now in cash, would reasonably compensate Billy W. Brown for the mental anguish he has suffered, if any, because of the unreasonable delay, if any?

ANSWER: $10,000.00.

QUESTION NO. 8.

Did Prudential's failure to act fairly and in good faith toward Billy W. Brown demonstrate a conscious indifference to, or reckless disregard of his rights or welfare?

ANSWER: Yes.

QUESTION NO. 9.

What sum of money, if any, do you find should be assessed against Prudential Insurance Company as exemplary damages?

ANSWER: $500,000.00.

QUESTION NO. 10.

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Billy W. Brown for attorney's fees incurred in the trial of this case?

ANSWER: $184,000.00.

QUESTION NO. 11.

What sum of money, if any, if paid now in cash, would reasonably compensate Billy W. Brown for attorney's fees, if there is:

a. An appeal of this Court's decision to a Court of Appeals?

ANSWER: $20,000.00.

b. An application for writ of error filed in the Texas Supreme Court after an appeal of a Court of Appeals?

ANSWER: $5,000.00.

c. An application for writ of error granted by the Texas Supreme Court?

ANSWER: $5,000.00.

d. A petition for writ of certiorari filed in the

U.S. Supreme Court after a writ of error is filed in or granted by the Texas Supreme Court?

ANSWER: $5,000.00.

e. A writ of certiorari granted by the U.S. Supreme Court?

ANSWER: $5,000.00.

In consideration of the foregoing jury verdict, and in consideration of the stipulation between the parties that the amount Defendant Prudential failed to reimburse Plaintiff Billy W. Brown for certain medical care of his cancer accruing under his contract of insurance was $42,000.00 as of October 14, 1981, it is hereby ORDERED, ADJUDGED, and DECREED that Plaintiff Billy W. Brown have Judgment against and recover from the Defendant

The Prudential Insurance Company of America as follows:

1. The sum of FORTY-TWO THOUSAND AND NO/100 DOLLARS ($42,000.00) as actual damages for reimbursement of medical expenses incurred as a result of Prudential's breach of contract, with prejudgment interest of THIRTY ONE THOUSAND THREE HUNDRED FIFTY THREE AND 24/100 DOLLARS ($31,353.24) accruing at the rate of ten percent per annum from October 14, 1981 through April 2, 1989, plus the sum

of $11.51 per diem thereafter until the date of this Judgment;

2. The FIVE THOUSAND FORTY AND NO/100 DOLLARS ($5,040.00) ($42,000.00 x .12) as statutory penalty Article 3.62 of the Texas Insurance Code for failure of Defendant to pay timely Plaintiff's claims.

3. SIXTY FIVE THOUSAND AND NO/100 DOLLARS ($65,000.00) as actual damages for mental anguish for Prudential's denial of the claim with no reasonable

basis and/or the failure of Prudential to reasonably investigate the claim, together with prejudgment interest of FORTY-NINE THOUSAND THREE HUNDRED FIFTEEN AND 89/100 dollars ($49,315.89) accruing at the rate of ten percent per annum from 180 days after March 4, 1981, the date of Plaintiff's demand letter to Defendant, through April 2, 1989, plus the sum of $17.81 per diem thereafter until the date of this Judgment;

4. The sum of TEN THOUSAND AND NO/100 DOLLARS ($10,000.00) as actual damages for mental anguish for Prudential's unreasonable delay in communicating its denial, together with prejudgment interest of SEVEN THOUSAND FIVE HUNDRED EIGHTY SEVEN AND 06/100 dollars ($7,587.06) accruing at the rate of ten percent per annum from 180 days after March 4, 1981 through April 2, 1989, plus $2.74 per diem thereafter until the date of this Judgment;

5. The sum of FIVE HUNDRED THOUSAND AND NO/100 DOLLARS ($500,000.00) as punitive damages;

6. The sum of ONE HUNDRED EIGHTY FOUR THOUSAND AND NO/100 DOLLARS ($184,000.00) as Plaintiff's reasonable attorney's fees for services rendered through the trial of this case;

7. The sum of TWENTY THOUSAND AND NO/100 DOLLARS ($20,000.00) in the event of an appeal to the Court of Appeals;

8. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event of an Application for Writ of Error to the Supreme Court of Texas;

9. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event the Texas Supreme Court grants such Writ of Error;

10. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event that an Application for Writ of Certiorari is made

to the United States Supreme Court; and

11. The sum of FIVE THOUSAND AND NO/100 DOLLARS ($5,000.00) in the event that the United States Supreme Court should grant Writ of Certiorari in this cause.

IT IS FURTHER ORDERED that the award of attorney's fees awarded herein is part of the Judgment hereby rendered.

IT IS FURTHER ORDERED that the Judgment hereby rendered shall bear interest at the rate of ten percent (10%) per annum from the date of Judgment until paid.

IT IS FURTHER ORDERED that the causes of action stated in Plaintiff's Fourth Amended Original Petition are not preempted by the provisions of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001, et. seq.

IT IS FURTHER ORDERED that all costs of court expended or incurred in this cause are hereby adjudged against the Defendant The Prudential Insurance Company of America. All writs and processes for the enforcement and collection of this Judgment or the costs of court may issue as necessary.

All other relief not expressly granted herein is specifically denied.

SIGNED this _____ day of _____

_____, 1989.

/s/
ALICE OLIVER TREVATHAN
Judge Presiding

APPROVED AS TO FORM:

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MADDOX, RUSSELL & VERNER
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By: /s/

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ATTORNEYS FOR DEFENDANT PRUDENTIAL
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[Entered May 2, 1989]

NO. 81-31687

BILLY W. BROWN,	§	IN THE DISTRICT
	§	COURT OF
Plaintiff	§	
	§	HARRIS COUNTY,
	§	T E X A S
PRUDENTIAL	§	
INSURANCE COMPANY	§	
OF AMERICA,	§	
	§	151ST JUDICIAL
Defendant	§	DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

CAME ON TO BE HEARD before the Court on January 17, 1989, a trial in limine on the issue of preemption of Plaintiff's state law claims by the provisions of the Employment Retirement Security Act of 1974 ("ERISA"), and the Court after hearing the evidence and the arguments of counsel enters the following Findings of Fact and Conclusions of Law:

I.

Findings Of Fact

1. At all times relevant to this lawsuit, the Independent Garagemen's Association ("IGA") was an association in fact comprised of employers involved in a number of businesses which were interrelated only in the sense that they all performed some work related to automobiles. (Richey, pp. 11, 13, 47-49).

2. On March 18, 1964 the Independent Garagemen's Association Insurance Trust (the "Insurance Trust") was created by the execution of an Agreement and Declaration of Trust by the Independent Garagemen's Association (the "Association") for the purpose of obtaining major medical and life

insurance for the employer members of the Association. (Depo. Richey, p. 10).

3. It was not mandatory that members of the IGA purchase insurance through the Association, but upon becoming members, these employers would be solicited to purchase insurance. Upon becoming a member of the Association, the employer would be contacted by a Prudential agent who had obtained the employer's name from a membership list provided by the IGA, and who would seek to sell insurance to the employer. (Richey, pp. 14, 36).

4. In the event that an employer did elect to purchase insurance through the IGA, that employer could choose to either pay all or a part of the premiums for the policy on behalf of

the employee, or charge the employee for such insurance without contributing anything. Prudential encouraged but did not require employer contribution. (Richey, p.87).

5. An employer who desired to obtain Prudential insurance through the IGA was customarily required to execute an adoption of and subscription to a written agreement and declaration of trust, which purported to created a trust called the Independent Garagemen's Association Insurance Trust (IGAIT). (Richey, p. 37).

6. Plaintiff Billy Brown's employer, Sonny's Automotive Transmission Service, obtained Prudential insurance through the IGA, although there is no evidence that

Sonny's Automatic Transmission Service did adopt and subscribe to the trust agreement. It was apparently not required to do so.

7. The IGAIT was created in 1964, long before the enactment of the Employment Retirement Income Security Act of 1974 (ERISA). The written agreement and declaration of trust by which the IGAIT was formed expired by its own provisions in 1985. The agreement and declaration was not, at least prior to 1985, amended to conform to the requirements of ERISA. (Richey Ex. 2, p. 5).

8. According to the written declaration of trust of the IGAIT, literally any "employer" may become a "subscriber" to the "trust," the sole

purpose of which was to facilitate employers' purchases of insurance. (Richey, pp. 33, 96 and Ex. 2).

9. The IGAIT was a mere conduit for the transmission of insurance premiums from the employers to Prudential, in that all premiums that were collected from the employers on a monthly basis were simply forwarded to Prudential, with the IGAIT retaining a small percentage for its marketing and billing services. The IGAIT did not have a "trust fund" to administer, since it simply forwarded the premiums it collected to Prudential while taking a percentage of the premiums as compensation for its services. (Richey, pp. 28, 95).

10. The IGAIT consistently showed a profit from its retention of premiums, and never operated at a loss. (Richey, pp. 30, 31, 58, 59).

11. Employees of the Association's members could not belong to the Association or independently obtain insurance through the Insurance Trust. (Richey, p. 34).

12. Prudential made the sole determination of the premiums to be charged to the employers and the employers had no input into the operation or administration of the "trust" or the selection of insurance. (Richey, pp. 40, 78).

13. Neither the "trust," nor Prudential ever filed a written employee benefit plan with the Department of

Labor or the Internal Revenue Services. (Richey, p. 40).

14. There was no statement of "ERISA rights" in either the Certificate of Insurance or in the Group Policy issued to the IGA by Prudential, nor was there any evidence that Plaintiff was ever provided such a statement as required by Federal law.

15. The only communications which occurred between the employees of the Association's members and the Insurance Trust were for additional information in connection with the Insurance Trust's handling of claims for Prudential. (Depo. Richey, p. 83).

16. The transactions between the Insurance Trust and Prudential

consisted of the mere purchase of insurance. (Depo. Richey, p. 10).

II.

Conclusions Of Law

1. The transactions between the Insurance Trust, its employer members, and Prudential were mere purchases of insurance.

2. The decision of the United States Court of Appeals for the Fifth Circuit in Taggart Corporation v. Life and Health Benefits Administration, 617 F.2d 1208, cert. denied sub nom., 450 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981), is dispositive of the issues before the Court.

3. The Insurance Trust agreement does not qualify as a written

plan or instrument within the meaning of 29 U.S.C. § 1102.

4. The Insurance Trust is not an "employee welfare benefit plan" within the meaning of 29 U.S.C. § 1002(1).

5. The Insurance Trust functioned as a conduit of premium payments by employer member's employees to Prudential.

6. ERISA does not regulate exclusive purchases of health insurance when the purchaser neither directly or indirectly owns, controls, administers or assumes responsibility for the policy or its benefits. Taggart Corporation v. Life and Health Benefits Administration, 617 F.2d 1208, cert. denied sub nom.,

405 U.S. 1030, 101 S.Ct. 1739, 68 L.Ed.2d 225 (1981).

7. The Insurance Trust was not an employer within the statutory meaning of 29 U.S.C. § 1002(5) since it was acting on behalf of the Association in procuring insurance, not the Association's member employers.

8. The Association is not an employee organization as defined by 29 U.S.C. § 1002(4).

9. The Insurance Trust contained no assets within the meaning of 29 U.S.C. § 1102 et seq., and was not liable for benefits to the employees of the employer members.

10. Plaintiff's state law claims for relief are not preempted by the provisions of the Employee

Retirement Income Security Act of 1974, 29 U.S.C. 1001, et seq. since ERISA does not govern the insurance contract before the Court.

11. Because Prudential has denied that it owed any fiduciary duty to Plaintiff, or any beneficiary, and because ERISA does not regulate non-fiduciary conduct, there is no ERISA preemption in this action. Jordan v. Reliable Life Insurance Co., 694 F. Supp. 822 (N.D. Ala. 1988).

SIGNED this 2nd day of May, 1989.

Alice Oliver Trevathan /s/
Judge Presiding

APPROVED AS TO FORM:

CALVIN, DYLEWSKI, GIBBS,
MADDOX, RUSSELL & VERNER
A Professional Corporation

By: /s/
Millard A. Johnson
TSB #10772500

THE SUPREME COURT OF TEXAS
P.O. Box 12248
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John T. Adams, Clerk

February 6, 1991

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Mr. C. Michael Clark
Calvin, Dylewski, Gibbs, Maddox &
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Mr. Jess W. Mason
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4500 First Interstate Bank
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Houston, TX 77002-5012

Mr. Peter J. Lynch
Calvin, Dylewski, Gibbs, Maddox &
Verner, P.C.
4500 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002-5012
RE: Case No. D-0364

Style: PRUDENTIAL INSURANCE COMPANY OF AMERICA v. BILLY W. BROWN

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error, as supplemented, with the notation, "Writ Denied."

Sincerely,

John T. Adams, Clerk

By: /s/
Blanca Morin, Deputy

THE SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
John T. Adams, Clerk

March 6, 1991

Ms. Susan Elizabeth Rees
U.S. Department of Labor
Office of Solicitor, Plan
Benefits Division
P.O. Box 1914
Washington, DC 20013

Mr. William J. Dyer
Weil, Gotshal & Manges
1600 First RepublicBank Center
700 Louisiana
Houston, TX 77002

Ms. Doris A. Beutel
Weil, Gotshal & Manges
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Calvin, Dylewski, Gibbs, Maddox &
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4500 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002-5012

RE: Case No. D-0364

Style: PRUDENTIAL INSURANCE COMPANY OF
AMERICA v. BILLY W. BROWN

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of application for writ of error in the above styled case.

Sincerely,

JOHN T. ADAMS, Clerk

By: /s/
Courtland Crocker,
Deputy

Fourteenth Court of Appeals
1307 San Jacinto, 11th Floor
Houston, Texas 77002

September 6, 1990

Hon. William J. Dyer
Weil, Gotshal & Manges
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4500 First Interstate Bank
1000 Louisiana
Houston, TX 77002

Hon. Jess W. Mason
4500 First Interstate Bank Plaza
1000 Louisiana Street
Houston, TX 77002

RE: CASE NO. 14-89-00695-CV

TRIAL COURT CASE NO. 81-31687

STYLE: Prudential Insurance Company of America v. Brown, Billy, W.

Counsel:

Please be advised that on this date, the Court OVERRULED appellant's(s') motion for rehearing in the above cause.

Further, application for writ of error, if any, must be submitted on or before Monday, October 8, 1990.

MARY JANE SMART, CLERK

By /s/
Deputy

[Filed on December 28, 1987]

NO. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HARRIS COUNTY,
	§	T E X A S
PRUDENTIAL	§	
INSURANCE COMPANY	§	151ST JUDICIAL
OF AMERICA	§	DISTRICT

DEFENDANT'S SECOND AMENDED ORIGINAL ANSWER

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Prudential Insurance Company of America ("Prudential"), who makes the following answer to the pleadings filed by Plaintiff Billy W. Brown ("Mr. Brown"):

I.

Prudential generally denies the material allegations of Mr. Brown's pleadings, and requests this Honorable Court to require Mr. Brown to prove his

case by preponderance of the credible evidence presented to the Court and a jury, as required by the laws of the State of Texas.

II.

Without waiving the foregoing general denial, Prudential would show by way of affirmative defense:

a. Mr. Brown's claim for benefits owing under the Prudential insurance policy was for charges for unnecessary services and supplies, and, thus, such charges were excluded from policy coverage. The Prudential insurance policy does not cover charges for any service or supply not reasonably necessary for the medical care of the patient's sickness or injury. Prudential denied Billy W. Brown's

policy claims for Dr. Stanislaw R. Burzynski's treatment and the cost of the drug Antineoplaston because such treatment and drug were not reasonably necessary.

b. Mr. Brown's claim for breach of contract is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. Billy W. Brown was covered by the Prudential insurance policy through the International Automotive Service Association Insurance Trust ("Insurance Trust"). The International Automotive Service Association, formerly the International Garagemen's Association, established the Insurance Trust in order to provide an employee benefit plan. The International Automotive Service

Association is an employee organization within the meaning of ERISA; the association has employee participation, and the association's function, in part, is to deal with employers concerning employee benefit plans. Both the International Automotive Service Association and the Insurance Trust engage in interstate commerce.

c. Mr. Brown's claim for breach of the duty of good faith and fair dealing is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. Billy W. Brown was covered by the Prudential Insurance Policy through the International Automotive Service Association Insurance Trust ("Insurance Trust"). The International Automotive

Service Association, formerly the International Garagemen's Association, established the Insurance Trust in order to provide an employee benefit plan. The International Automotive Service Association is an employee organization within the meaning of ERISA; the association has employee participation, and the association's function, in part, is to deal with employers concerning employee benefit plans. Both the International Automotive Service Association and the Insurance Trust engage in interstate commerce.

d. Mr. Brown's claim for negligence is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C.§ 1001, et seq. Billy W. Brown was covered by the Prudential Insurance

Policy through the International Automotive Service Association Insurance Trust ("Insurance Trust"). The International Automotive Service Association, formerly the International Garagemen's Association, established the Insurance Trust in order to provide an employee benefit plan. The International Automotive Service Association is an employee organization within the meaning of ERISA; the association has employee participation, and the association's function, in part, is to deal with employers concerning an employee benefit plan. Both the International Automotive Service Association and the Insurance Trust engage in interstate commerce.

e. Mr. Brown's claim for breach of contract is also preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. because Sonny's Automatic Transmission Service, Inc., Billy W. Brown's employer, established and maintained an employee benefit plan through the Insurance Trust. Sonny's Automatic Transmission Service, Inc., is in the transmission servicing business, and in this business it engages in interstate commerce and participates in an industry or activity affecting interstate commerce.

f. Mr. Brown's claim for breach of the duty of good faith and fair dealing is also preempted by the Employee Retirement Income Security Act

of 1974, 29 U.S.C. § 1001, et seq. because Sonny's Automatic Transmission Service, Inc., Billy W. Brown's employer, established and maintained an employee benefit plan through the Insurance Trust. Sonny's Automatic Transmission Service, Inc., participates in the transmission servicing business, and in this business it engages in interstate commerce and is in an industry or activity affecting interstate commerce.

g. Mr. Brown's claim for negligence is also preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, because Sonny's Automatic Transmission Service, Inc., Billy W. Brown's employer, established and maintained an employee

benefit plan through the Insurance Trust. Sonny's Automatic Transmission Service, Inc., is in the transmission servicing business, and in this business it engages in interstate commerce and participates in an industry or activity affecting interstate commerce.

III.

Prudential at this time reserves the right to amend its answer to Mr. Brown's allegations after it has had an opportunity to investigate more closely these claims, as is its right and privilege under the Rules of Civil Procedure and the laws of the State of Texas.

IV.

WHEREFORE, PREMISES CONSIDERED, Prudential prays that upon final trial

and hearing hereof it have judgment in accordance with the law and the facts as determined by this Honorable Court and Jury, that it have its costs in this behalf incurred, and for such other and further relief, general and special, legal and equitable, to which it may show itself justly entitled.

Respectfully submitted,

BAKER & BOTTS

By /s/
William J. Dyer
Texas Bar No. 06321100
One Shell Plaza
Houston, Texas 77002
713/229-1639

ATTORNEYS FOR DEFENDANT
PRUDENTIAL INSURANCE
COMPANY OF AMERICA

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument

has been hand delivered to counsel for the Plaintiff on this 28th day of December, 1987.

/s/
William J. Dyer

[Filed May 3, 1989]

NO. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
	§	COURT OF
	§	
VS.	§	HARRIS COUNTY,
	§	T E X A S
THE PRUDENTIAL	§	
INSURANCE COMPANY	§	151ST JUDICIAL
OF AMERICA	§	DISTRICT

DEFENDANT'S MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT, NEW TRIAL, AND REMITTITUR

TO THE HONORABLE JUDGE OF SAID COURT:

Defendant The Prudential Insurance Company of America ("Prudential") respectfully files the following motions for judgment notwithstanding the verdict, new trial, and remittitur:

I. Motion for Judgment Notwithstanding the Verdict

A. Judgment Should Be Entered Based on the First Jury's Verdict for Prudential Because Judge Gupton Erred in Granting a New Trial

1. Prudential respectfully moves the Court to vacate the Final Judgment signed on April 3, 1989, in favor of Plaintiff Billy W. Brown ("Mr. Brown"), because Prudential was entitled to judgment in its favor based on the unanimous verdict rendered on June 4, 1986, in the first trial of this cause. On June 30, 1986, the Court (Hon. Solomon Casseb presiding) entered a take-nothing judgment based upon that verdict. However, on August 6, 1986, the Court (Hon. T.M. Gupton presiding) granted Mr. Brown's motion for new trial, and signed findings and

conclusions in connection with that ruling on August 11, 1986.

2. The record from the hearing on Mr. Brown's motion for new trial does not support Judge Gupton's findings and conclusions. For the reasons stated in Prudential's Motion for Reconsideration of Order Granting New Trial (filed on or about May 11, 1987, and incorporated herein by reference), there was no admissible, competent evidence of jury misconduct. The evidence upon which Mr. Brown relied was either (i) incompetent as a matter of law under Tex. R. Civ. P. 327(b) and Tex. R. Civ. Evid. 606(b), (ii) inadmissible hearsay, (iii) immaterial to the jury's unanimous verdict, or (iv) failed to show "outside

influence" as that term is defined under Texas law.

3. Accordingly, the Final Judgment in Prudential's favor that was signed on June 30, 1986, should be reinstated, notwithstanding the second jury's verdict.

B. Prudential is Entitled to Judgment Based on Its Affirmative Defense That the Underlying Contract Between Mr. Brown and Dr. Burzynski Was Illegal

4. As a matter of law, the underlying contract between Mr. Brown and Dr. Stanislaw R. Burzynski (or his clinic/institute) for treatment using antineoplastons was illegal, and thus void; accordingly, Prudential was not liable to reimburse Mr. Brown for the antineoplaston charges. Prudential

therefore respectfully moves for entry of judgment in its favor notwithstanding the second jury's verdict (or in the alternative, for a new trial), based on its affirmative defense of illegality.

5. At all times relevant to this lawsuit, section 16 of the Texas Food, Drug and Cosmetic Act provided that

> [n]o person shall sell, deliver, offer for sale, hold for sale or give away any new drug unless (1) an application with respect thereto has been approved and said approval has not been withdrawn under Section 505 of the Federal Act [21 U.S.C. § 355], or (2) when not subject to the Federal Act, unless such drug has been tested and has been found to be safe for use and effective in use under the conditions prescribed, recommended, or suggested in the labeling thereof, and prior to selling or offering for sale such drug, there has been filed with the [Texas] Commissioner of Health an application setting forth

[extensive data regarding the drug].

Tex. Rev. Civ. Stat. Ann. art. 4476-5 (Vernon 1976).

6. As Mr. Brown has judicially admitted, "[t]here is no dispute in this case that antineoplastons were not approved by the FDA. Nor were they approved by the Texas Department of Health."[18]

7. Dr. Burzynski's sale of antineoplastons to Mr. Brown therefore violated section 16 of the Texas Food, Drug and Cosmetic Act. At all times pertinent to this lawsuit, section 3 of that Act, Tex. Rev. Civ. Stat. Ann. art.

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18. Plaintiff's Response to Defendant's Motion for Leave to File Third Amended Answer and Special Exceptions Thereto (filed on or about January 27, 1989), at 6-7.

4476-5, § 3(d) (Vernon 1976) (recodified at Tex. Rev. Civ. Stat. Ann. art. 4476-5, # 3(e) (Vernon Supp. 1989), provided that it was "unlawful and prohibited" to sell, deliver for sale, hold for sale, or offer for sale any article in violation of section 16.

8. Mr. Brown's attorneys attempt to rely[19] on section 5.09 of the Texas Medical Practice Act, which provides in pertinent part that "[a] person licensed to practice medicine under this Act is authorized to supply the needs of his patients with any drugs or remedies as are necessary to meet the

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19. Plaintiff's Response to Defendant's Motion for Leave to File Third Amended Answer and Special Exceptions Thereto (filed on or about January 27, 1989), at 7.

patients' immediate needs." Tex. Rev. Civ. Stat. Ann. art. 4495b, § 5.09(a) (Vernon Supp. 1989).

9. Mr. Brown's attorneys apparently contend that this section of the Medical Practice Act grants a blanket exemption to all licensed physicians which would allow them to prescribe illegal drugs if they deem those drugs to be "necessary to meet the patients' immediate needs." But the Medical Practice Act does not so state; no Texas case so holds; and statutory construction of the term "any drugs" to include illegal drugs would make a mockery of both the Medical Practice Act and the Texas Food, Drug and Cosmetic Act. Instead, the only fair and reasonable interpretation of this

section in the Medical Practice Act is that it referred to legal drugs.

10. Under familiar rules of statutory construction, one statute should not be construed in a manner that makes another, related statute meaningless. The obvious intent of the Texas Food, Drug and Cosmetic Act was to bring within State regulation those new drugs that were not being regulated by the Federal Food & Drug Administration. There is nothing in the Medical Practice Act which suggests that the Legislature intended to give physicians the right to prescribe illegal drugs.

11. The State Board of Medical Examiners obviously shares this view of these two statutes, as evidenced by the fact that they have sought to have Dr.

Burzynski's license suspended or revoked for violation of these statutes.[20]

12. The Texas Food, Drug and Cosmetic Act is an important statute enacted to protect the public health. As such, it "is not merely regulatory," and contracts made in violation thereof are illegal, void, and unenforceable. Peniche v. Aeromexico, 580 S.W.2d 152 (Tex. Civ. App. -- Houston [1st Dist.] 1979, no writ). "[O]ur courts will neither aid in the enforcement of such a contract, nor grant any relief to a party who has executed it." Id. at 156. Indeed, Texas courts will deny recovery when enforcement of a contract is sought

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20. See Prudential's Motion for Continuance (filed on or about January 13, 1989).

even by someone, like Mr. Brown, whom the statute was designed to protect. See, e.g., Montgomery Ward v. Lusk, 52 S.W.2d 1110 (Tex. Civ. App. -- Waco 1932, writ ref'd); Peniche, 580 S.W.2d at 155-56. Moreover, "[a] contract to do a thing which cannot be performed without a violation of the law is void, whether the parties know the law or not." Texas Employers' Insurance Association v. Tabor, 283 S.W. 779 (Tex. Comm. App. 1926, judgmt. adopted).

13. Prudential obviously does not contend that its contract of insurance with the IGA Insurance Trust, under which Mr. Brown was a beneficiary, was illegal. However, "[t]he test of whether a demand connected with an illegal transaction

may be enforced at law is whether or not a case may be established without reliance on the illegal transaction." Pioneer Mutual Compensation Co. v. Diaz, 177 S.W.2d 202, 203 (Tex. 1944). In this case, all of Mr. Brown's claims against Prudential are premised on his contractual obligation to pay Dr. Burzynski for antineoplaston therapy; in the words of the Pioneer court, his case may not be established without reliance on the illegal transaction between him and Dr. Burzynski, and his demand for damages from Prudential therefore may not be enforced at law.

C. Judgment Should Be Entered for Prudential Because All of the Claims Mr. Brown Has Pleaded Are Preempted by ERISA

14. For the reasons stated in Defendant Prudential Insurance Company of America's Proposed Findings of Fact and Conclusions of Law on ERISA (filed on January 18, 1989, and hereby incorporated by reference), all of the state-law claims pleaded by Mr. Brown are preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 et seq.

15. At a post-verdict hearing on Friday, March 31, 1989, the Court granted Mr. Brown leave to file, in the alternative to his state-law claims, a trial amendment raising claims under ERISA; to date, he has not chosen to do so.

16. Having failed to avail himself of his opportunity to replead

under ERISA, Mr. Brown's entire lawsuit should be dismissed with prejudice, and judgment should be entered for Prudential. Cathey v. Metropolitan Life Insurance Co., 764 S.W.2d 286, 289 (Tex. App. -- Houston [1st Dist.] 1988, no writ) (affirming trial court's dismissal of state law claims based on ERISA preemption when plaintiffs "were offered the opportunity to amend their petition to assert a cause of action under ERISA but expressly refused to do so").

II. **Motion for New Trial**

17. Prudential respectfully moves for a new trial, in support of which Prudential re-urges (and hereby incorporates by reference) all of its objections to the Court's charge, including but not limited to its

objections (i) that there was no evidence to justify the submission of any jury questions[21] against Prudential; (ii) that there was insufficient evidence to support the submission of such questions; and (iii) that the jury's affirmative findings in response to such questions were against the great weight and preponderance of the evidence.

18. More specifically, but without waiver of the foregoing grounds, Prudential also moves for a new trial on grounds that there was no evidence (or in the alternative, there was insufficient evidence, or in the

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21. More specifically, Questions No. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 (and subparts a through e thereof).

alternative, the jury's findings were against the great weight and preponderance of the evidence) with respect to any mental anguish suffered by Mr. Brown. Mr. Brown testified at the second trial that he had never even lost a single night's sleep because of his concern with his unpaid medical bills. Nor did he offer any proof of any physical manifestations that are the necessary predicate to the recovery of mental anguish damages under Texas law. Finally, Mr. Brown admitted that he had never been harassed or pressed by Dr. Burzynski for payment of his bills, and that he had not had to sell his family farm or suffer any other sévere economic disruptions of his life. The evidence

simply cannot support an award of $75,000 for mental anguish damages.[22]

19. Prudential also moves for a new trial on grounds that the Court's charge permitted the jury to compensate Mr. Brown twice for the same element of damages -- that is, his alleged mental anguish from Prudential's claims handling and decision. In particular, it was improper to submit both Question No. 2 (on Prudential's alleged breach of a duty of good faith and fair dealing) and Question No. 5 (on Prudential's alleged unreasonable delay in communicating its denial of Mr. Brown's

---

22. In the alternative, Prudential moves the Court to disregard the jury's answers to Questions No. 3, 4, 6, and 7 regarding Mr. Brown's alleged mental anguish.

claim), since Question No. 5 was simply a "phase or shade" of the same inquiry made in Question No. 2. Question No. 6 was also defective in that it inquired only whether Prudential's alleged unreasonable delay was "a proximate cause of damages to Billy W. Brown"; the question should have been limited to "mental anguish," rather than referring to damages generally and unspecifically. The net effect of these erroneous submissions has been to allow Mr. Brown to "double-dip," or to achieve a double recovery for the same alleged injury.

20. Prudential further moves for a new trial on grounds that there was no pleading to support the submission of Questions No. 5, 6, and 7 regarding Prudential's alleged

unreasonable delay in making its claims decision. In the alternative, Prudential moves the Court to disregard the jury's affirmative response to Questions No. 5, 6, and 7 regarding such alleged delay.

21. Without waiver of the foregoing grounds, Prudential also moves for a new trial on grounds that there was no evidence (or in the alternative, there was insufficient evidence, or in the alternative, the jury's findings were against the great weight and preponderance of the evidence) with respect to Question No. 8 regarding Prudential's alleged "conscious indifference to, or reckless disregard of, [Mr. Brown's] rights or welfare." All of the evidence adduced at trial

demonstrated that Prudential carefully and diligently considered whether Mr. Brown's antineoplaston therapy was covered under the terms of his insurance policy. Even if the jury believed that Prudential reached the wrong conclusion, there was simply no credible evidence to establish that Prudential was indifferent to Mr. Brown's rights or welfare -- much less that Prudential recklessly disregarded them.

22. Prudential also moves for a new trial on grounds that the Court improperly excluded material, admissible evidence offered by Prudential, including but not limited to the following:

a. The testimony of Glenda Steed regarding her

observations of Dr. Burzynski's patients over several years, certain admissions made to her by Dr. Burzynksi's "Director of Pharmacy," Barbara Burzynski, and other matters tending to (i) impeach the credibility of Mr. Brown's expert witnesses, and (ii) refute Mr. Brown's claim that antineoplaston therapy was "reasonably necessary" for the treatment of his cancer.

b. The testimony of Dr. Emil J. Freireich regarding his inquiries into antineoplaston therapy, his opinion that antineoplaston therapy was not reasonably necessary for the treatment of any cancer patient,

and that Dr. Burzynski's antineoplaston therapy displayed many features common to unproven or "quack" remedies in general.

c. The testimony contained in the bill of exceptions from Dr. Burzynski, including his admissions that (i) he obtained urine from Gilley's nightclub and other sources without any adequate controls or inspection of urine donors; (ii) he was cited by the FDA for unsafe and impure manufacturing techniques that had occurred during the time period of Mr. Brown's therapy; (iii) that he had been enjoined by the United States District

Court for the Southern District of Texas from continuing to ship his antineoplastons across state lines in violation of the Federal Food, Drug and Cosmetic Act; and (iv) that the Texas Board of Medical Examiners has commenced proceedings to suspend or revoke his license to practice medicine for violations of Texas laws governing the conduct of physicians.

d. The testimony from Angelina Wise offered to explain further the circumstances of Prudential's mistaken payments to other insureds for antineoplaston therapy.

23. Prudential also moves for a new trial on grounds that the Court erred in admitting, over Prudential's objections, certain prejudicial, inadmissible evidence offered by Mr. Brown, including but not limited to the following:

a. Evidence that Prudential had made payments with respect to other insureds.

b. References to payments made to Dr. Burzynski or other patients of his by insurance companies other than Prudential.

c. Hearsay testimony regarding Dr. Sproul's onetime (and later retracted) opinions in favor of antineoplaston therapy.

d. Evidence of Prudential's wealth and resources.

24. Prudential also moves for a new trial on grounds that the Court abused its discretion in denying Prudential's Motion for Continuance, based on the pending proceedings to revoke or suspend Dr. Burzynski's license.

25. Finally, Prudential moves for a new trial -- to the Court, rather than to a jury -- on grounds that the Court erred in denying Prudential's Motion to Strike Plaintiff's Demand for Jury Trial. For the reasons stated in Defendant Prudential Insurance Company of America's Proposed Findings of Fact and Conclusions of Law on ERISA (filed

on January 18, 1989, and hereby incorporated by reference), Mr. Brown's state-law claims are preempted by ERISA, and ERISA does not allow for a jury trial. E.g., Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980); Sweeney v. Aetna Life Insurance Co., No. H-87-1435 (S.D. Tex. Feb. 18, 1988).

III. **Motion for Remittitur**

26. Prudential respectfully moves the Court to offer a remittitur (and to grant a new trial if Mr. Brown fails to accept the remittitur) with respect to most or all of the $500,000 in exemplary damages awarded by the jury. This award is manifestly excessive and grossly disproportionate when compared to Mr. Brown's stipulated contract damages of $42,000. The Court,

in the exercise of its sound discretion, should grant a remittitur of that entire award, or -- at a minimum -- all but $126,000 thereof (comprising three times Mr. Brown's contract damages).

27. In the alternative, Prudential respectfully moves the Court to offer a remittitur (and to grant a new trial if Mr. Brown fails to accept the remittitur) on grounds that the award of $500,000 in exemplary damages is excessive and unconstitutional. Both the Bill of Rights of the Texas Constitution[23] and the Eighth Amendment to the United States Constitution

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23. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted. . . ." Tex. Const. art. I, § 13.

(incorporated and made binding upon the States through the Due Process Clause of the Fourteenth Amendment)[24] contain prohibitions against excessive fines and cruel and unusual punishments. See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 109 S. Ct. 527, 57 U.S.L.W. 3390 (1988) (granting a writ of certiorari from 845 F.2d 404 (2d Cir. 1988), on the question of whether an award of $6 million in punitive damages on account of a purely economic tort was excessive under the Eighth Amendment or otherwise).

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24. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VII.

28. Finally, Prudential moves the Court to offer a remittitur (and to grant a new trial if Mr. Brown fails to accept the remittitur) as to all damages except Mr. Brown's contract damages of $42,000, plus interest and attorneys' fees. For the reasons stated in Defendant Prudential Insurance Company of America's Proposed Findings of Fact and Conclusions of Law on ERISA (filed on January 18, 1989, and hereby incorporated by reference), Mr. Brown's state-law claims are preempted by ERISA. Exemplary and other extra-contractual damages (such as mental anguish damages) are not recoverable under ERISA. E.g., Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134 (1985); Powell v. Chesapeake & Potomac Telephone Co.,

780 F.2d 419 (4th Cir. 1985), 476 U.S. 1170 (1986).

IV. Conclusion and Prayer

29. For the foregoing reasons, Prudential respectfully moves the Court to enter judgment in its favor notwithstanding the verdict; in the alternative, to grant a new trial; or in the alternative, or order a remittitur.[25]

Respectfully submitted,

WEIL, GOTSHAL & MANGES

By /s/
William J. Dyer

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25. To the extent that any of Prudential's arguments and statements of grounds for one of these motions may support the other motions made herein, such arguments and grounds are incorporated by reference in such other motions.

Texas Bar No. 06321100
Doris A. Beutel
Texas Bar No. 02275130
700 Louisiana, Suite 1600
Houston, Texas 77002
(713) 546-5186

ATTORNEYS FOR DEFENDANT THE
PRUDENTIAL INSURANCE
COMPANY OF AMERICA

Certificate of Service

I hereby certify that a true copy of the foregoing was hand delivered to counsel for Plaintiff Billy W. Brown, Millard A. Johnson, Esq., on this 3rd day of May 1989.

/s/
William J. Dyer

October 5, 1990

Mr. William J. Dyer
Ms. Doris A. Beutel
Weil, Gotshal & Manges
700 Louisiana, Ste. 1600
Houston, TX 77002

Mr. Mark G. Lazarz
Weil, Gotshal & Manges
700 Louisiana, Suite 1600
Houston, TX 77002

Mr. Millard A. Johnson
Calvin, Dylewski, Gibbs et al
4500 First Interstate Bank
1000 Louisiana
Houston, TX 77002

RE: Case No. D-0364

Style: PRUDENTIAL INSURANCE COMPANY OF AMERICA v. BILLY W. BROWN

Dear Counsel:

Motion for extension of time to file application for writ of error under Rule 130(d), T. R. A. P., was this day granted.

The application for writ of error is due to be filed in the Court of Appeals on or before the 15th day of October, 1990.

JOHN T. ADAMS, CLERK

By: /s/
Trencha Damian, Deputy

AGREEMENT AND DECLARATION OF TRUST

AGREEMENT made at Austin, County of Travis, State of Texas, as of the 18th day of March, 1964, between the INDEPENDENT GARAGEMEN'S ASSOCIATION OF TEXAS, herein called the Association, and HENRY ROSE, FRANK LOPEZ, ALLEN RICHEY as Trustees, who by their execution of this Agreement hereby accept the trust herein created to be known as the INDEPENDENT GARAGEMEN'S ASSOCIATION INSURANCE TRUST, herein called the Trust, and declare that they will administer the Trust pursuant to the provisions of this Agreement,

WHEREAS, employers who desire to provide group insurance for their employees and the families of such employees have requested the Association to enter into an agreement with trustees under which any monies paid to the Trustees on account of such insurance will be held in a fund forming the trust estate of the INDEPENDENT GARAGEMEN'S ASSOCIATION INSURANCE TRUST, which trust fund is herein referred to as the Fund;

NOW, THEREFORE, in consideration of the premises it is mutually agreed as follows:

ARTICLE I

PURPOSE OF THE TRUST

The purpose of the Trust is to establish and maintain the Fund to provide life and accident and health insurance for employees of employers and members of families of employees. The term "employees" shall comprise employees of employers, and proprietors and partners whenever an employer is a proprietorship or a partnership, if such proprietors and partners are actively engaged in and devote a substantial part of their time to the conduct of the business of the employer, and the Trustees and their employees, if the Trustees have made arrangements to such effect with the insurance carrier. Any of such insurance as the Trustees may determine shall be provided through one or more group policies issued by insurance carriers.

ARTICLE II

THE POLICIES

Section 1. PROCURING OF POLICIES. Upon execution of this Agreement the Trustees shall procure a policy or policies providing such of the insurance specified in Article I as they shall determine. Additional policies providing any of such insurance as the Trustees shall determine may be procured

by them at any time thereafter. The term "policy" as used herein shall include any rider, endorsement, or amendment made a part of a policy.

Section 2. CONTROL BY TRUSTEES. The Trustees shall agree with each insurance carrier upon all of the provisions to be contained in each policy and the requirements for insurance thereunder. All the rights and privileges granted to the policyholder by a policy or allowed by the insurance carrier shall be vested in the Trustees and they may take any action with respect to each policy or the insurance provided thereunder permitted by the insurance carrier. The Trustees may enter into such agreements with the insurance carrier as they deem necessary or advisable in regard to any such insurance.

Section 3. SHORT METHOD CLAIM ADMINISTRATION. The Trustees may agree with each insurance carrier that any one or more persons designated by them, which may include one or more of the Trustees, shall sign drafts upon the insurance carrier in the amounts approved for the payment os claims under a policy.

ARTICLE III

PARTICIPATION

Section 1. ENROLLMENT OF SUBSCRIBERS AND PAYMENTS OF SUBSCRIBERS TO THE FUND. A corporation, proprietorship or partnership that has executed an employer's request for participation in the trust may request participation in the insurance under a policy by submitting a request for such participation to the trustees together with an initial payment determined by the Trustees on the basis of the insurance to be provided. If the requirements for the participation in the insurance under a policy are satisfied, the corporation, proprietorship pr partnership shall be enrolled as a Subscriber to the Trust. If a corporation, proprietorship or partnership is not accepted for such participation any payment made by it for such purpose shall be returned and there shall be no further obligation in connection therewith. A corporation, proprietorship or partnership that is accepted as a Subscriber shall thereafter make payments on such dates and in such amounts as the Trustees shall require for providing the insurance under each policy and administering the Trust. Participation of a corporation, proprietorship or partnership under each policy shall continue until all insurance upon which

the payments of the Subscriber were based has been terminated pursuant to the provisions of the policy. If permitted by the insurance carrier, the Association may become a Subscriber and participate in the insurance under a policy on the same basis as other corporations.

Section 2. CONTRIBUTIONS REQUIRED OF EMPLOYEES OF SUBSCRIBERS. To the extent and in the manner permitted by any policy, rules, regulations and laws which are applicable, each Subscriber may require contributions from his insured employees toward the cost of providing insurance under a policy, and such contributions shall be included in the payments of the Subscribers to the Fund.

Section 3. COVERAGE OF TRUSTEES AND THEIR EMPLOYEES. If permitted by the insurance carrier, the Trustees may arrange with the insurance carrier that the Trustees, their employees, and the families of the Trustees and their employees, be insured under the policies. The portion of the payments required for such insurance which is not derived from any contributions required of the Trustees and their employees shall be at the expense of the Fund.

Section 4. ADMINISTRATION OF TRUST. To properly administer the insurance and the Trust, the Trustees

may adopt such rules and regulations including any requirements for eligibility of Subscribers for participation in the Trust and require the Subscribers to furnish such information as the Trustees deem necessary or advisable.

Section 5. INTEREST OF THE ASSOCIATION, EMPLOYERS, PERSON INSURED AND PERSONS CLAIMING THROUGH THEM. Neither the Association, nor any Subscriber, person insured or person claiming by or through an insured person by reason of having been named a beneficiary for insurance benefits or otherwise, shall have any claim against the Fund or any other property of the Trust. The rights and interests of persons insured and persons claiming by or through them shall be limited to the insurance benefits specified in the policies.

ARTICLE IV

NATURE AND USE OF THE FUND

Section 1. NATURE OF THE FUND. The Fund shall consist of all Subscriber payments made to the Trustees in accordance with the provisions of Section 1 of Article III, policy dividends whether received by the Trustees or left with insurance carriers to accumulate with interest, investments made by the Trustees and income thereon

and any other money or property which shall come into the hand of the Trustees in connection with the administration of the insurance and the Trust. The Trustees may make investments only in such securities as are legal for investment of trust funds under the law of the jurisdiction first above named.

Section 2. USE OF THE FUND. The Trustees may use the Fund as follows:

(a) to pay all expenses which they consider necessary in establishing the Trust and Fund, and in administering the Trust and the insurance;

(b) to pay premiums on the policies;

(c) to make investments as specified in Section 1 of this Article IV;

(d) to make refunds to Subscribers;

(e) to apply amounts for the benefit of persons insured under the policy or policies if such persons make contributions toward the cost of providing

insurance on themselves and their families.

ARTICLE V

THE TRUSTEES

Section 1. SELECTION OF A CHAIRMAN AND SECRETARY. The Trustees shall select one of their number to act as chairman and one to act as secretary, to serve for such periods as the Trustees shall determine.

Section 2. TERM OF OFFICE OF TRUSTEES. Each Trustee shall serve until his death, resignation or removal.

Section 3. RESIGNATION OF A TRUSTEE. A Trustee may resign upon giving thirty days' notice in writing to the Association.

Section 4. REMOVAL OF A TRUSTEE. Any Trustee may be removed from office at any time by an instrument in writing signed by the Association and delivered to all the Trustees.

Section 5. APPOINTMENT OF A SUCCESSOR TRUSTEE. IN case any Trustee shall die, resign or be removed, a successor Trustee shall be appointed forthwith by an instrument in writing signed by the Association and delivered to all of the Trustees. Immediately upon his acceptance of the trusteeship

in writing a successor Trustee shall become vested with all the property, rights, power and duties of a Trustee hereunder with like effect as if originally named as a Trustee.

Section 6. COMPENSATION OF TRUSTEES AND THE ASSOCIATION AND ITS EMPLOYEES. The Trustees shall be reimbursed for all reasonable and necessary expenses incurred by them in the performance of their duties and shall otherwise receive no compensation, except that provision may be made to compensate one or more Trustees for special executive or administrative services performed in the administration of the Trust. The Trustees may call upon the Association and its employees for assistance in the administration of the Trust and may reimburse the association and its employees for any expenses incurred in connection therewith.

Section 7. MEETINGS OF TRUSTEES. A meeting may be called at any time by the chairman or any two of the Trustees upon giving five days' written notice to the other Trustees.

Section 8. REQUIRED VOTE OF TRUSTEES. Any action by the Trustees may be taken either at a meeting or in writing without a meeting. Concurrence of a majority of the Trustees shall be required for action taken at a meeting

and concurrence of all the Trustees shall be required for action taken without a meeting. No action shall be taken unless there are at least two Trustees.

Section 9. NAME OF THE TRUSTEES COLLECTIVELY AND EXECUTION OF INSTRUMENTS. The name of the Trust may be used to designate the Trustees collectively and all instruments may be effected by them in such name upon the signature of any Trustee or other person that the Trustees may designate for that purpose.

Section 10. LIABILITY OF TRUSTEES. No Trustee shall be liable for any action pursuant to the Trust in good faith taken or omitted nor for any action taken or omitted by any agent, employee or attorney selected with reasonable care not for any action taken or omitted by any other Trustee, nor for loss incurred through investments of monies of the Trust or failure to invest.

ARTICLE VI

DEALINGS WITH THE TRUSTEES

In dealings with the Trustees, there shall be no obligation to see to application by them of any funds or property of the Trust or to see that the terms of the Trust have been complied

with and no obligation to inquire into the necessity or expediency of any act of the Trustees, and every instrument effected by the Trustees, whether signed by all of them or in the manner set forth in Section 9 of Article V, may be relied upon as to any facts set forth therein and shall be conclusive that

(a) at the time of delivery of said instrument, the Trust was in full force and effect and, except where there has been notice of an amendment, was in the form set forth in this Agreement as of its effective date; and

(b) said instrument was executed in accordance with the terms and conditions of the Trust; and

(c) the execution and delivery of the instrument was duly authorized.

ARTICLE VII

AMENDMENT AND TERMINATION OF THE TRUST

Section 1. AMENDMENT. The Trustees may amend this Agreement at any time to such extent as they deem necessary or advisable, except that no amendment shall change the Trust to a

purpose other than as set forth in Article I nor shall there by any amendment of this Article VII.

Section 2. TERMINATION. The Trust shall terminate at the expiration of 21 years from the date first above written but may be terminated at any time prior thereto by an instrument in writing executed by the Association. Upon termination of the Trust, the Trustees shall pay all obligations of the Trust and charge them to the Fund. The Trustees shall thereupon first use the Fund to continue insurance on all employees insured under the policies and the families of such employees to the extend possible, and then either apply any remaining balance of the Fund for the benefit of such of those employees and the families of such employees as were insured thereunder at the time of the termination of the policies, in such manner as the Trustees determine shall best carry out the purpose for which the Fund was established, or pay such balance to such employees. Anything hereinabove to the contrary notwithstanding the Trustees, upon termination of the Trust and settlement of all obligations of the Trust, may, with the consent of the Association, transfer the policies and the remaining surplus, or any portion thereof, of the Fund to the trustees of any trust or trusts established for a substantially similar purpose to be applied for uses

substantially similar to those set forth in Section 2 of Article IV.

ARTICLE VIII

SITUS AND CONSTRUCTION OF THE TRUST

The Trust is accepted in the jurisdiction first above named and all questions pertaining to its validity, construction and administration shall be determined in accordance with the laws of such jurisdiction.

IN WITNESS WHEREOF, this Agreement has been executed by the undersigned as of the date first above written.

INDEPENDENT GARAGEMEN'S ASSOCIATION OF TEXAS

By /s/
President

/s/ Henry Rose, San Antonio
Trustee

/s/ Frank S. Lopez
Trustee

/s/ Allen Richey
Trustee

Attest:

/s/ Robert Ratliff
Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June, 1991, three (3) copies of the Appendix to Petition for Writ of Certiorari were served by first class mail, postage prepaid, to Millard A. Johnson, 4500 First Interstate Bank, 1000 Louisiana, Houston, Texas 77002-5012, (713) 224-5771. All parties required to be served have been served. I am a member of the Bar of this Court.

Morton L. Susman

MORTON L. SUSMAN
Counsel of Record

Supreme Court, U.S.
FILED
JUL 19 1991
OFFICE OF THE CLERK

(3)

No. 90-1884

In The

Supreme Court of the United States

October Term, 1991

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

BILLY W. BROWN,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District

BRIEF OF RESPONDENT, BILLY W. BROWN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 90-1884

In The

Supreme Court of the United States

October Term, 1991

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

BILLY W. BROWN,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District

BRIEF OF RESPONDENT, BILLY W. BROWN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Billy W. Brown prays that the Petition be dismissed for want of jurisdiction. Alternatively, Respondent prays that the Court decline to issue a Writ of Certiorari to the Texas Fourteenth Court of Appeals.

OPINIONS BELOW

Petitioner has filed its Appendix with the Court pursuant to Supreme Court Rule 14(k). Petitioner's Appendix fails to comply with paragraph (i) of Rule 14(k), because it does not include the January 19, 1989 ruling of the Texas trial court on Petitioner's preemption claims. That

ruling was delivered from the bench after a *separate trial* on those issues.[1]

JURISDICTION

Pursuant to 28 U.S.C. § 1257, this Court does not have jurisdiction over Petitioner's claims since Petitioner failed to present to or obtain a decision from the highest Texas court in which review could be had of the federal questions it specially set up or claimed in the trial court.

STATUTES AND RULES INVOLVED

Title 28 of the United States Code, Section 1257, subsection (a) provides, in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Title 29 of the Code of Federal Regulations, Part 2510, Section 3, subsection j, provides:

> For purposes of Title I of the Act [ERISA] and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include a group or group-type insurance program offered by an insurer to employees or members of an employee organization, under which
>
> (1) No contributions are made by an employer or employee organization;
>
> (2) Participation [sic] the program is completely voluntary for employees or members;

---

[1] The trial court's ruling from the bench on Petitioner's preemption claims is set forth on page 7, *infra*.

(3) The sole functions of the employer or employee organization with respect to the program are, without endorsing the program, to permit the insurer to publicize the program to employees or members, to collect premiums through payroll deductions or dues checkoffs and to remit them to the insurer; and

(4) The employer or employee organization receives nc consideration in the form of cash or otherwise in connection with the program, other than reasonable compensation, excluding any profit, for administrative services actually rendered in connection with payroll deductions or dues checkoffs.

Title 29 of the Code of Federal Regulations, Part 2510, Section 37, subsection (b)(2) provides, in pertinent part:

A plan is considered to be in existence if: (i)(A) The plan was reduced to writing and adopted by the participating employers and the employee organization. . . .

STATEMENT OF THE CASE

There are two threshold issues that the Court should determine before considering the merits of Petitioner's claims. First, the Court should determine whether any of Petitioner's claims are properly within its jurisdiction since the claims specially set up in the trial court were not pressed to or passed upon by the highest court of Texas in which review could be had. Secondly, the Court should determine whether it will consider evidence outside the record of the separate trial conducted on federal preemption questions – evidence that Petitioner apparently regards as necessary to sustain its arguments. These threshold issues are addressed in Parts I and II, below.

FACTUAL BACKGROUND

In June, 1981, Respondent Billy W. Brown ("Brown") sued Petitioner Prudential Insurance Company of America ("Petitioner") in a state district court in Harris County,

Texas. Brown's claims arose from Petitioner's refusal to pay for reasonable and necessary medical services and supplies used to combat Brown's prostate cancer. Petitioner raised no ERISA preemption claims whatsoever in reply to Respondent's suit. Rather, it demanded that he try his case to a jury under Texas law. (F. Supp. Tr., 38). In fact, Petitioner proceeded to trial solely upon state law issues without raising any ERISA preemption claims.[2]

Following rendition of a jury verdict in Petitioner's favor, it was discovered that an attorney had made improper communications to the jury foreman and surreptitiously supplied the jury with material previously ruled inadmissible by the Court. The trial court ruled that the attorney's unprofessional and improper conduct tainted the jury's verdict. He ordered that the case proceed to another jury trial on both issues of liability and damages. (F. Supp. Tr., 295).

In preparation for the re-trial before a newly appointed judge, the Hon. Alice O. Trevathan, Brown's attorneys sought the documents from Petitioner which constituted his claims file. The claims file had not been available to Brown at the previous trial. It was not until Brown's attorneys had secured a court order requiring production of those documents and awarding substantial monetary sanctions (S. Supp. Tr., 357)[3] that Petitioner's attorney finally released the documents. The contents of the claims file (PX 99) set the stage for a verdict much different than the one which followed the initial trial. At the same time that it was waging its ultimately unsuccessful battle to withhold Brown's claims file from him, Petitioner filed its Second Amended Answer. In this pleading, it claimed for the first time that Brown's claims were governed by ERISA, and thereby sought to avoid a re-trial at which it

---

[2] It is most ironic to find Petitioner now decrying all the proceedings below as "unnecessary litigation." (*See* Pet., pp. 17; 63).

[3] Petitioner's pleadings had already been stricken once before as a sanction for resisting discovery. (F. Supp. Tr., 73).

would have to confront the extraordinarily damaging documents.

Upon the motion of Petitioner (F. Supp. Tr., 983), the re-trial of the case was bifurcated. The first trial was to consist of a proceeding before Judge Trevathan, sitting without a jury. The second trial was to be held only in the event that the bench trial resulted in a ruling against Petitioner on its preemption claims, and was to be conducted before a jury solely upon Brown's claims.

The bench trial was conducted upon the claims appearing in Petitioner's Second Amended Answer. (Pet. App. G1-G11). These claims were substantially different than the claims Petitioner now seeks to urge upon this Court. As stated in its Second Amended Answer, Petitioner's claims were that:

(1) The International Garagemen's Association (the "IGA") was an association of *employees* (an "employee organization") which formed a multiple employer ERISA plan; and

(2) The Houston business where Brown worked ("Sonny's") was an "employer" within the meaning of ERISA, who allegedly established an individual ERISA plan by subscribing to the I.G.A. Insurance Trust.

(*Id.* G2-G9).

The "Separate Trial on ERISA Preemption" began as scheduled on January 17, 1989:

> THE COURT: Ms. Miles, we're now proceeding with a separate trial, and the separate trial is by agreement. All parties have signed off on the Order for Separate Trial to determine whether or not the case as plead by the Plaintiff is preempted by the ERISA statute and should be governed by federal law.
>
> All right. It is my understanding, if this is acceptable with you, Mr. Dyer, that you've agreed to go forward ___

> [MR. DYER, FOR PETITIONER]: *Your Honor, our proof on the subject of ERISA is short and sweet. It is limited,* at least as part of our opening presentation, *to the deposition of Jean Richey which was taken pursuant to a notice of deposition issued by the Plaintiff, Mr. Brown,* on July 21, 1987. We tendered that deposition in its entirety to the Court and would also offer into evidence each and all of the exhibits that were attached to the deposition.
>
> THE COURT: Do you have any objections, sir? . . .
>
> [MR. JOHNSON, FOR BROWN]: I have no objection, Your Honor.
>
> THE COURT: Movant Prudential's Exhibit 1, which is the deposition of Jean Richey and its attached exhibits, will be permitted.
>
> (Movant's Exhibit 1 admitted in evidence).
>
> MR. DYER: With respect to this in-limine hearing on the separate trial of ERISA preemption *Prudential rests.*

(Tr. Separate Trial on ERISA Preemption, Vol. I, pp. 5-8). (Emphasis added.) Thus, Petitioner rested its case in chief, having introduced *only* the deposition of Ms. Richey. However, Ms. Richey's testimony utterly negated the claim that the IGA was an "employee organization" since it established that individual employees could *not* join the organization. (Richey Depo., 34). Further, Ms. Richey's testimony failed to establish Petitioner's other claim that Sonny's had formed an individual ERISA plan. When Brown rested, Petitioner introduced no further evidence on rebuttal, and the Court then took the case under advisement. (Tr. Separate Trial on ERISA Preemption, Vol. I. p. 106).

On January 19, 1989, the Court again convened, and issued the following decision from the bench:

> THE COURT: 81-31687
>
> There was an agreed separate trial, non-jury on the issue of whether or not ERISA governs the trial of this cause and preempts state law.
>
> The Court has found that . . . Prudential Insurance Company's policy, which Mr. Brown, was

> the beneficiary, is not governed by – in this case we're proceeding under state law. *The Court is allowing both sides to submit proposed findings and conclusions.*
>
> The judgment of the Court is that this matter, this dispute will be governed under the applicable state law.
>
> Mr. Dyer understands now that the *remaining* issues in the case will proceed to trial. *It is the Court's determination that they will proceed to a jury trial because there was a demand for a jury.*

(*Id.*, Vol. II, pp. 112-13). (Emphasis added.)

As permitted by the trial court, Petitioner filed its proposal for entry of fact findings and conclusions of law. (Resp. App., A1 *et seq.*). In this proposal, Petitioner sought findings and conclusions to support two different theories: (1) that the IGA was an "employee organization" which formed a multiple employer plan, and (2) that the IGA was an "employer" who formed a plan.[4] Petitioner *did not request any findings or conclusions to support the claim that Sonny's formed an individual plan.* Obviously, Petitioner recognized that the evidence it introduced at the separate trial of preemption issues could not conceivably support any favorable findings or conclusions on this claim.

Brown's claims were tried between January 26 and February 20, 1989. At the conclusion of the trial, the jury was given written questions only upon Brown's claims, and answered those questions favorably to Brown. Since the trial judge had already tried and ruled upon Petitioner's preemption claims, no questions as to the factual elements of those claims were submitted to the jury.[5]

---

[4] The trial court was not authorized to enter findings or conclusions on the latter claim, since Petitioner failed to raise it in its pleadings. Tex. R. Civ. P. 301.

[5] Despite the fact that Petitioner's ERISA preemption issues were tried in a prior separate trial, throughout its

(Continued on following page)

On April 3, 1989, the trial court entered a formal written judgment on Brown's claims. (Pet. App., B1-B16). The findings of fact and conclusions of law on Petitioner's preemption claims were not recited in the judgment, but were set forth in a separate document. (Pet. App. C1-C12). Under Texas law, Petitioner had ten days in which to file a request for entry of whatever additional or amended findings or conclusions that were necessary to support its pleaded claims that the IGA was an "employee organization" or that Sonny's was an "employer" which had formed an ERISA plan. Tex. R. Civ. P. 298. Petitioner filed *no* request for additional or amended findings. Instead it filed a "Motion for Judgment N.O.V." (Pet. App., H1 *et seq.*) in which it merely incorporated by reference the arguments raised in its previously filed proposal of findings and conclusions, i.e., that the IGA was either an "employee organization" or an "employer" which formed a multiple employer plan. By failing to file a request for additional or amended findings and conclusions supporting the claim that Sonny's formed an "individual" employer plan, Petitioner waived that claim in its entirety.[6] *Able v. Able*, 725

(Continued from previous page)

Petition it cites this Court to testimony developed *at the trial of Brown's claims*. Petitioner's preemption claims were no longer at issue at that point, and the testimony at the later trial can have thus no bearing whatsoever on the claims. If – as Petitioner seems to suggest by citing to such testimony – its claims *were* at issue then, they were clearly waived. Petitioner concedes that under Texas law, a claim is waived unless there are *pleadings, proof,* and *findings* of the facts supporting that claim. (Pet., p. 61). Since no proof was put before the jury and no jury findings were sought or obtained on Petitioner's preemption claims, those claims were waived if still at issue at that point, pursuant to the very rule Petitioner cites. Tex. R. Civ. P. 279.

[6] Petitioner no longer bothers to venture the other argument that the IGA was an "employee organization" and in fact abandoned that claim in the trial court.

S.W.2d 778 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd n.r.e.); *Pinnacle Homes Inc. v. R.C.L. Offshore Engineering Co.*, 640 S.W.2d 624 (Tex. App. – Houston [14th Dist.] 1982, writ ref'd n.r.e.). The trial court overruled Petitioner's "Motion for Judgment N.O.V.," and Petitioner appealed to the Texas Fourteenth Court of Appeals.

In its appeal to the Texas Fourteenth Court of Appeals, Petitioner made several strategic decisions which had a considerable impact upon the scope of appellate review there:

1. Petitioner predicated all of its appellate complaints regarding ERISA issues upon the trial court's rejection of its *Motion for Judgment N.O.V.* (in which it had argued only that the IGA was an "employee organization" or an "employer" which formed a multiple employer plan);
2. Petitioner abandoned the argument that the IGA was an "employee organization," and substituted in its place the contention, nowhere raised in its Second Amended Answer, that the IGA was an "employer;" and
3. Petitioner failed to challenge any of the trial court's fact findings.[7]

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[7] Under Texas law, findings of fact which have not been properly contested in the trial court *and* properly challenged by points of error on appeal are conclusively established. *Ervin v. Ervin*, 624 S.W.2d 264 (Tex. App. – Eastland 1981, writ dism'd); *Carter v. Carter*, 736 S.W.2d 775 (Tex. App. – Houston [14th Dist.] 1987, no writ). Petitioner failed to contest the fact findings in *either* the trial court *or* the Court of Appeals. Petitioner now misrepresents that it *did* challenge those finding. (Pet., p. 13). However, the very language Petitioner quotes from its state court brief (*See* Pet., p. 7) belies its claims. The first sentence in the quoted excerpt is explicitly directed to the trial court's *conclusions of law*. The second sentence in the quoted

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(*See* Appellant's Brief to the Texas Fourteenth Court of Appeals). After Respondent pointed out these matters to the Texas Fourteenth Court of Appeals in his responsive brief,[8] the Court of Appeals issued an unpublished opinion which carefully considered the undisputed fact findings in light of applicable case law, and properly rejected Petitioner's meritless appeal on the basis of those findings.[9]

When Petitioner sought review from the Texas Supreme Court, it once again changed its preemption claims. In its application for writ of error, Petitioner not only failed to reurge the only claim supported by pleadings in the trial court, i.e., that the IGA was an "employee organization," but failed to argue the claim that Sonny's had formed a single employer plan by obtaining insurance through the

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excerpt is clearly directed at Conclusion of Law No. 1, in which the trial court held that "[t]he transactions between the Insurance Trust, its employer members and Prudential were mere purchases of insurance." (Pet. App., C-9). Moreover, Petitioner's point of error in its state court appellate brief was predicated only upon the overruling of the Motion for Judgment N.O.V. Such a point of error raised only a question of law, and did not put at issue any fact findings. *Eubanks v. Winn*, 420 S.W.2d 648 (Tex. 1967). Even if Petitioner's appellate brief *had* been sufficient, the fact remained that it failed to request additional or amended findings following the trial court's entry of findings of fact. *Able v. Able*, 725 S.W.2d 778 (Tex. App. – Houston [14th Dist.] 1987, writ ref'd). Despite all of Petitioner's protestations to the contrary, it failed to preserve the right to contest the trial court's fact findings, and is not entitled to try its case *de novo* in this Court.

[8] Both parties' briefs to the Texas Fourteenth Court of Appeals have been filed as lodgings with the Court.

[9] Though Prudential would have the Court believe that the decision of the Texas Fourteenth Court of Appeals in this case will have far reaching impact on Federal law, this is untrue. Rule 90(i), Texas Rules of Appellate Procedure, states unequivocally that "[u]npublished opinions shall not be cited as authority by counsel or by a court."

IGA.[10] The *only claim asserted in Petitioner's application for writ of error to the Texas Supreme Court was that the IGA was an "employer" which established a multiple employer ERISA plan, a claim nowhere asserted in its trial pleadings.* Obviously unimpressed with these appellate shenanigans, the Texas Supreme Court declined to issue a writ and thus promote further "unnecessary litigation."

I.

REASONS FOR DISMISSAL FOR LACK OF JURISDICTION

It is Petitioner's burden to affirmatively demonstrate that this Court has jurisdiction over its claims. *Department of Mental Hygiene of Cal. v. Kirchner,* 380 U.S. 194 (1965). It has not met and cannot meet this burden. Due to Petitioner's perplexing and improper practice of changing its position at each level of the appellate process while wending its way to this Court, "the highest court [below] in which a decision could be had" – the Texas Supreme Court – *was never asked* to decide and never decided the federal questions "specially set up or claimed" in the Texas trial court. *See* 28 U.S.C. § 1257. Long standing precedent holds that in such a case, this Court lacks jurisdiction to consider such questions.

To determine what federal questions were "specially set up or claimed" within the meaning of 28 U.S.C. § 1257, the focus is upon the claims asserted in the trial court:

> [T]he proper time of setting up the claim is in the trial court, whenever that is required by the state practice in accordance with which the highest court of a state will not revise a judgment of the court below, on questions not therein raised.

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[10] The parties' briefs to the Texas Supreme Court have also been filed as lodgings by Brown.

Spies v. Illinois, 123 U.S. 131 (1887); *See also Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291 (1903). Moreover, the decision of "the highest court in which a decision could be had" must be against the *same* federal claim "specially set up" in the trial court. *Spies*, 123 U.S. at 181; *See also Layton v. Missouri*, 187 U.S. 356 (1902).

A comparison of the arguments raised in Petitioner's Second Amended Answer in the trial court, its Brief to the Texas Fourteenth Court of Appeals, and its Application for Writ of Error to the Texas Supreme Court demonstrates beyond any doubt that Petitioner failed to request or obtain a decision from the highest court of Texas on the federal questions specially set up in the trial court:

COURT		CLAIMS ADVANCED BEFORE COURT
1. TRIAL COURT	(1)	The IGA was an "employee organization" which established a multiple employer ERISA plan.
	(2)	Sonny's was an "employer" which established a single employer ERISA plan.[11]
2. INTERMEDIATE APPELLATE COURT	(1)	The IGA was an "employer" which established a multiple employer ERISA plan.
	(2)	Sonny's was an "employer" which established a single employer ERISA plan.[12]

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[11] *See* Petitioner's Second Amended Answer. (Pet. App., 6-1 *et seq.*) Petitioner orally attempted to raise in the trial court a claim that the IGA was an "employer," but Petitioner concedes that in order to prevail on a claim in Texas Courts, one must *plead, prove, and obtain* findings upon the facts supporting the claim. (Pet., p. 61). Petitioner did *none* of these things, much less *all* of them.

[12] The latter claim was *ineffectively* raised in the intermediate court, because Petitioner's Second Point of Error to the

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3. HIGHEST COURT OF STATE	(1)	The IGA was an "employer" which established a multiple employer ERISA plan.[13]

The claim that Sonny's formed an individual plan was clearly *abandoned* in the intermediate court both by Petitioner's assignment of error to the Motion for Judgment N.O.V. *and* its failure to carry that complaint forward in its subsequent appeal to the Texas Supreme Court. With respect to that claim, Petitioner was in the same position it would occupy as if it had filed no application for writ of error at all. *See Banks v. State of California,* 395 U.S. 708 (1969) (a decision cannot be reviewed in this Court where the highest appellate court in the state had discretionary power to review it and no effort was made by the defeated party to have that court exercise review). This Court should not be left to speculate as to how the Texas Supreme Court would have decided that question had it been presented to it. *Stratton v. Stratton,* 239 U.S. 55 (1915). The Texas Fourteenth Court of Appeals' opinion simply cannot be viewed as a decision of the "highest court" on that claim.[14]

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Fourteenth Court of Appeals complained only of the trial court's ruling on its Motion for Judgment N.O.V. (*See* Appellant's Brief to Fourteenth Court of Appeals). That motion merely incorporated by reference the claims asserted in Petitioner's proposed fact findings and conclusions of law, which were that the IGA was an "employer" or "employee organization" which formed a *multiple employer* plan. (Pet. App., H1 *et seq.*) Hence, *at best,* only those claims could be raised in the intermediate court of appeals by the assignment of error; and the claim that the IGA was an "employer" was itself flawed because it was not supported by pleadings in the trial court.

[13] *See* Petitioner's Application for Writ of Error to the Texas Supreme Court. Nowhere did Petitioner urge that Sonny's was an "employer" which formed a single employer plan.

[14] Indeed, the opinion of the Texas Fourteenth Court of Appeals does not *address* the claim for the very reason that the question was not before it.

As for the claim that the IGA was an "employer" which formed a multiple employer plan, that claim was not "specially set up" in the trial court. *See Spies*, 123 U.S. at 187. Under Texas practice, claims not raised in the pleadings will not be reviewed on appeal. *Davis v. Campbell*, 572 S.W.2d 660 (Tex. 1978). When a party *specifically pleads* his claims or defenses – as Petitioner did in this case – he is limited to those specific claims or defenses. *Richardson v. First. Nat. Life Ins. Co.*, 419 S.W.2d 836 (Tex. 1967). Thus, under *Spies*, the claim was not "specially set up." *Spies*, 123 U.S. at 181. In short, neither of the two claims now asserted by Petitioner are properly before the Court.

II.

REASONS FOR CONFINING ANY REVIEW TO THE EVIDENCE INTRODUCED AT THE SEPARATE TRIAL ON ERISA PREEMPTION

It is beyond dispute that Petitioner tried its ERISA preemption claims to the trial judge sitting without a jury, well before the trial of Brown's claims took place. Yet, throughout its entire discussion of its preemption claims, Petitioner makes only one cryptic reference to the separate trial. Petitioner has buried even that slight acknowledgment in a footnote. (Pet., p. 7, n. 5).

Worse, Petitioner has set out the procedural history of the case in a manner that intentionally leaves the impression that its ERISA preemption claims were simultaneously at issue with Brown's claims, and that both were resolved at the same trial. (Pet., pp. 10-11). Petitioner's rather obvious purpose in creating this misimpression is to have this Court consider evidence introduced at the *subsequent* trial which the trial court would not and did not consider in connection with the *already adjudicated* preemption claims. Indeed, by its repeated citations to testimony not offered, admitted, or received at the trial of its preemption claims on January

17, 1989, Petitioner implicitly concedes both that its arguments cannot withstand scrutiny without reference to such extraneous evidence, and that the record of the separate trial on ERISA preemption is woefully insufficient to support the contentions it attempts to foist upon the Court as established, undisputed fact. The only evidence this Court should consider is that evidence that was available for the trial court to consider at the trial held on Petitioner's preemption claims – the deposition of Ms. Richey.

Under Texas law, the trial court's ruling on Petitioner's claim could not be attacked on appeal using evidence other than Ms. Richey's deposition. Evidence developed at the *subsequent* trial on Brown's claims was unavailable for such purposes:

> The appellate court will review the ruling of a lower court on the record that was before the lower court at the time the ruling was made, and will not as a rule consider matters outside the record.

5 TEX. JUR. 3d, *Appellate Review* § 648 (1980).[15]

Federal appellate courts have observed the same rule. *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029 (D.C. Cir. 1988) (function of appellate court is to review the record before district court at time of decision, not the record at some later point). *Kirshner v. Uniden Corp. of America*, 842 F.2d 1074 (9th Cir. 1988) (evidence submitted to trial court

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[15] This rule is aptly illustrated in *Dorbandt v. Bailey*, 453 S.W.2d 205 (Tex. Civ. App. – Tyler 1970, writ ref'd n.r.e.). There, the trial court held a hearing on some of the issues presented in the case. Following the hearing, it handed down an interlocutory decision as to those issues. The case then proceeded to a jury trial on the remaining issues. On appeal, the party against whom the interlocutory judgment was rendered attempted – like Petitioner here – to attack that judgment with the testimony from the *subsequent* jury trial. The appellate court, citing the above rule, held that the judgment must stand or fall on the basis of the evidence before the court *at the time of its decision*. *Id.* at 208.

after decision could not be part of record on appeal, and should be stricken); *Heath v. Helmick*, 173 F.2d 156 (9th Cir. 1949) ("[t]he cause must be tried here upon the record made at the original trial").

No doubt cognizant of this rule, Petitioner refrained from relying upon testimony developed in the jury trial in its briefs to the *Texas courts*. Apparently, Petitioner's level of desperation in this, the forum of last resort, now compels it to venture well beyond the evidence all courts below were asked to consider.[16]

To consider evidence other than that before the trial court at the time the issues were decided is not a sensible exercise of appellate review. This is especially true where the trial court, as here, *granted Petitioner's own motion* to subject issues to separate trials for purposes of convenience and judicial economy. If the result from the first trial can be attacked with the record of the second trial, the entire procedure of employing separate trials is transformed into a vehicle for one party to unfairly receive a "second bite at the apple."

III.

REASONS FOR DENYING THE WRIT

The federal question Petitioner attempts to pose to this Court was *never* properly before the trial court or the

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[16] Petitioner did not dare refer the Texas appellate courts to either testimony from the jury trial or a hearsay *affidavit* offered post-trial since neither was properly before those courts on these issues. Now, Petitioner improperly cites throughout its Petition to this Court, not only to testimony from the jury trial on Brown's claims (*See*, Pet., p. 27; p. 29; p. 31; p. 31, n. 13; p. 32; and p. 37), but also the hearsay affidavit filed with the trial court after the court ruled against Petitioner from the bench. (F. Supp. Tr., 1173 *et seq.*). The trial court received the filing of the Affidavit with the admonishment that it would only be accorded such weight as allowed by

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Texas Fourteenth Court of Appeals because Petitioner failed to adduce evidence at the ERISA trial which would establish the facts that it repeatedly represents to this Court as true:

1. that Brown's employer *purchased* the insurance benefits; and
2. that Brown's employer *obtained the insurance by adopting or subscribing to a trust agreement.*[17]

On a record utterly insufficient to pose the question, Petitioner now asks the Court to decide:

> "Whether an *employer who provides insurance* for its employees *through a trust agreement* has established an employee welfare benefit plan as that term is defined under ERISA."

(Pet., pp. 16-17, emphasis added).

To substantiate that this is in fact a case in which an "employer provid[ed] insurance," Petitioner finds it necessary (due to the insufficiency of the evidence it introduced at the separate trial) to repeatedly refer to testimony from the *subsequent jury trial* that was not before the trial court, the Texas Fourteenth Court of Appeals, or the Texas Supreme Court for purposes of determining the preemption issues. (*See* Pet., p. 29; p. 31-p. 31 n. 13; p. 32; p. 37). To establish that this is a case in which the employer obtained insurance "through a trust agreement," Petitioner makes the following misrepresentations to this Court:

> "Here, the Insurance Trust was established and maintained by an employer . . . *because the Declaration of Trust was adopted by . . . Brown's employer, Sonny's Automatic Transmission Service.*"

(Pet., p. 29, emphasis added).

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Texas law; i.e., none. Tex. R. Evid. 801. Brown invites the Court to review Petitioner's state court briefs which have been filed with the Court as lodgings, and compare the matters cited to those courts with that now cited to this Court.

[17] Even the testimony from the subsequent trial on Brown's claims that is improperly cited by Petitioner fails to support these claims.

> *"Brown derived all insurance benefits from his employer's adoption of the Insurance Trust . . . ,* thus, *as an "adopting member," Brown's employer established an individual "plan" under* ERISA . . . "

(Pet., p. 32, n. 14, emphasis added).

> "[I]t is apparent that *Sonny's,* as an employer, *established an employee welfare benefit "though its adoption of the Insurance Trust."*

(Pet., p. 37, emphasis added).

> *"Brown's employer expressed an intent, through subscription to the Insurance Trust, to provide benefits* on a regular and long term basis."

(Pet. p. 42, emphasis added). Such assertions are flatly contradicted by the trial court's findings of fact.[18] (*See* Pet. App., C4-C5).

The trial court, on the evidence submitted to it and on the claims Petitioner properly put before it, confronted and answered only this question: if an employee obtains insurance through his employer's involvement with a trade association of unrelated employers, does a multi-employer ERISA plan arise?[19] The court's answer was "no" – an answer in complete harmony with all the federal appellate decisions Petitioner cites as "conflicting" authority. The Texas Fourteenth Court of Appeals,

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[18] In Finding of Fact No. 6, the trial court specifically observed that "there is *no evidence* that Sonny's Automotive Transmission Service did adopt and subscribe to the Trust Agreement" and that Sonny's was "apparently not required to do so." (Pet. App., C4-C5, emphasis added).

[19] The fact that neither the trial court nor the Texas Fourteenth Court of Appeals was ever called upon to answer the question Petitioner now poses to this Court emphasizes all the more this Court's lack of jurisdiction under 28 U.S.C. §1257. "The purposes of the requirement that a federal question be raised in the state court plainly are not satisfied if one question is presented to the state court and a different question is presented to the Supreme Court." 16 C. WRIGHT, A. MILLER, *et al.,* FEDERAL PRACTICE AND PROCEDURE § 4022 (1977).

reviewing that decision in light of the evidence introduced at the trial and the undisputed fact findings before it, arrived at the same decision that any of its federal counterparts would have reached, given the same facts.

A. Federal Case Law Rejects The Notion That The IGA Constitutes An "Employer" For Purposes Of ERISA.

When it realized that the preemption claims stated in its trial pleadings were not convincing to the trial court, Petitioner attempted to orally raise the issue that the IGA was an "employer". This argument has no more merit than the claims that *were* "specially set up" in the trial court.

Though Petitioner represents that trade organizations such as the IGA have been "routinely held" to constitute "employers" for purposes of ERISA (Pet., p. 48), such claims have found no degree of judicial acceptance, much less "routine" approval.[20] Indeed, such claims have been summarily rejected. *See Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449 (5th Cir. 1991).

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[20] The only case dealing with a trade association that is cited for the proposition that insurance trusts are "routinely held" to be "employers" under ERISA is a case that briefly noted – without analysis and apparently because the issue was uncontested or stipulated – that the Association in that case was regulated by ERISA. *Twin City Pipe Trades Service Ass'n v. Fred Plaas Plumbing & Heating Co.*, 815 F.2d 58, 59 (8th Cir. 1987). That case did not *hold* that such associations are "employers" under ERISA. Likewise, *Minnesota Chamber of Commerce & Industry v. Hatch*, 672 F.Supp. 393 (D. Minn. 1987) (cited in Pet., p. 48) does not hold that such entities are ERISA *employers. To the contrary, the parties in the case stipulated* that the entity was governed by ERISA, and the Court merely accepted the stipulation. The other case cited by Petitioner, *California*

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The Second, Fifth, Seventh, and Eleventh Circuits have each rejected claims that entities such as the IGA may form a single ERISA plan by enrolling unrelated employees or employers into a single insurance trust. *Matthew 25 Ministries, Inc. v. Corcoran*, 771 F.2d 21 (2d Cir. 1985); *Gahn*, 926 F.2d 1449 (5th Cir. 1991); *Taggart Corp. v. Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *cert. denied*, 450 U.S. 1030 (1981); *Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982).

The only authority that Petitioner discusses at any length which addresses this question is *Insurance & Prepaid Benefits Trusts v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981). However, that case rejected the notion that insurance trusts form single ERISA plans by insuring employees of employers in a particular trade, and actually supports the decision below.

Marshall stands for two propositions: (1) the insurance trust must, both in form and substance, be controlled by an "employer" as defined by ERISA; and (2) employers must, both in form and substance, establish or maintain the trust solely for the benefit of their

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Chamber of Commerce v. Simpson, 601 F.Supp. 109 (C.D. Cal. 1985), held merely that a trade association has associational standing to sue on behalf of its members. In the face of Petitioner's representation that "numerous cases . . . have held that a trade association, such as the IGA, may be considered as a cognizable group or association for purposes of ERISA" (Pet., p. 48, n. 17), it is most interesting to note that of the cases Petitioner discusses, *only one* squarely addresses the question. That case *flatly rejects* Petitioner's contentions. *Insurance & Prepared Benefits Trusts v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981). Indeed, that court acknowledge that the "judicial and legislative rejection of multiple employer trusts" has been virtually unanimous. *Id.* at 705, citations omitted.

employees. *Marshall*, 90 F.R.D. at 705-7. Whether a trust is "established or maintained" . . . "for its participants" depends upon whether the *express terms of the trust document* limit participation to those who are qualified to participate under ERISA. *Id.*

The trust document at issue in *Marshall* defined "participating employer" as, *inter alia*:

> Any individual; employer, whether a corporation, partnership, or sole proprietorship; an association of employers; . . . [and] another trust fund established to provide benefits similar to those of this trust; . . .

Id. at 707, n. 6. The term "employee" was defined under the trust document as:

> Those persons in the service of a participating employer, including in the case of a sole proprietorship or partnership, the sole proprietor or the partners, to the extent provided by the Benefit Committee . . .

Id. Because the terms "employee" and "participating employer" as defined by the trust documents were overly inclusive in scope, the court concluded that the trust was not established or maintained "for its participants or beneficiaries." *Marshall*, 90 F.R.D. at 707. In so finding, the court distinguished the case before it from one in which ineligible participants were included in the plan through something other than over inclusiveness of the trust documents themselves. *Id.*

Under the *Marshall* analysis, the IGA Insurance Trust clearly does not qualify as an ERISA plan. The trust agreement in this case was executed in 1963, well before the enactment of ERISA. As the trial court found, it was never subsequently modified to comply with the requirements and standards of ERISA. (Pet. App., C5). *Cf. Marshall*, 90 F.R.D. at 704 (noting that the trust agreement in that case *was* modified).

The IGAIT trust agreement obviously suffers from the same over inclusiveness observed in *Marshall*. The trust document at issue here defines "employees" as follows:

> The term "employees" shall comprise employees of employers, and proprietors and partners whenever an employer is a proprietorship or a partnership, if such proprietors and partners are actively engaged in and devote a substantial part of their time to the conduct of the business of the employer, and the Trustees and their employees, if the Trustees have made arrangements to such effect with the insurance carrier.

(Pet. App., J2). With regard to who may "participate" in the trust (and thus *maintain* it) the trust document states:

> A corporation, proprietorship or partnership in the Trust may request participation in the insurance under a policy by submitting a request for such participation to the Trustees together with an initial payment determined by the Trustees on the basis of the insurance to be provided. If the requirements for the participation in the insurance under a policy are satisfied, the corporation, proprietorship or partnership shall be enrolled as a Subscriber to the Trust. . . . A corporation, proprietorship or partnership that is accepted as a Subscriber shall thereafter make payments on such dates and in such amounts as the Trustees shall require for providing the insurance under each policy and administering the Trust. . . . If permitted by the insurance carrier, the [International Garagemen's] Association may become a Subscriber and participate in the insurance under a policy on the same basis as other corporations. . . . If permitted by the insurance carrier, the Trustees may arrange with the insurance carrier that the Trustees, their employees, and the families of the Trustees and their employees, be insured under the policies.

(Pet. App., J4-J5). Moreover, at least one of the Trustees of the Trust, Mr. Allen Richey, was clearly *not* an employer engaged

in the automotive industry, but one employed as a magazine editor by the IGA itself. (Richey Depo., pp. 10, 24)[21]

Thus, neither element of the two pronged test utilized in *Marshall* is satisfied. In form, the Trustees were not, at the relevant time, representative of a cognizable group of employers, and the "participants" potentially eligible under the trust agreement were not limited to those persons qualifying as "participants" under ERISA.

Recognizing that the Trust Agreement is overexpansive by its inclusion of non-employers and non-employees, Petitioner relies upon the "qualifying" language in the Trust Agreement that limits the participation of such non-employees and non-employers to those "permitted by the insurance carrier," (Pet. App., J4-J5), and argues that "the group policy issued by Prudential requires that only employees who are engaged in the repair and servicing of automobiles may participate." (Pet., p. 48, n. 17). Under the Petitioner's own case authority, this observation is unavailing. Even in situations where in practice only persons eligible to participate in an ERISA plan were permitted to become participants of the trust, the fatal problem of an overly inclusive trust document is not corrected. *Marshall*, 90 F.R.D. at 707.

Moreover, this particular feature of the trust document militates against a finding that the Trust was "controlled" by its members. The evidence here shows that *Petitioner*, as

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[21] Petitioner now represents that "the five-member board of trustees of the Insurance Trust are all independent automotive service employers who belong to the IGA and have been active in the IGA since its inception," citing the deposition of Ms. Richey. The cited testimony is utterly irrelevant, since it establishes only that *at the time of Ms. Richey's deposition*, the Trustees *happened* to be employer members of the IGA. It does not change the fact that the Trust Agreement allowed virtually *anyone* to be appointed a Trustee, and that non-employers served as Trustees. Moreover, it sheds no light as to the identity of the Trustees at the *relevant time period*, i.e., when Sonny's obtained the insurance.

opposed to the IGA, controlled all of these essential operational functions of the Trust:

> (1) Disposition of "trust funds";
>
> (2) Determinations as to what corporation[s], proprietorships, partnerships should be enrolled in the Trust;
>
> (3) Determinations as to what employees, trustees, partners or proprietors would be allowed to claim insurance benefits through the trust;
>
> (4) The premiums to be charged for the insurance benefits; and
>
> (5) The amount of benefits to be paid to the employees, trustees, partners or proprietors allowed to obtain benefits.[22]

Thus, when Petitioner repeatedly asserts that the "employer members" of the trust were in "control" of the trust, it is

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[22] The "trust funds" were simply premium payments which were forwarded by the members to the IGA, and then forwarded by the IGA to Petitioner. Thus, to the extent there *were* any "trust funds," (*Cf.* FOF 9, Pet. App., C6), Petitioner had control over them. Petitioner admits that *it* controlled the next two operational aspects of the trust, by defining through the terms of its group policy what entities or individuals could be enrolled and what individuals would benefit. Indeed, the authority to control such matters was virtually ceded to the insurance carrier through the terms of the trust agreement, as Petitioner recognizes. As to the fourth function, the trial court found (and Petitioner did not contest) that it "made the sole determination of the premiums to be charged to the employers and the employers had no input into the operation or administration of the 'trust' or the selection of insurance." (Pet. App., C7). As to the fifth and final function, the evidence showed that all claims were paid with checks written on Petitioner's bank accounts, and that Petitioner made the ultimate decision as to how much to pay the employees in response to their insurance claims. (Richey Depo., p. 27). Indeed, it was Petitioner's bad faith exercise of this power that led to the judgment against it.

simply begging the question. Since Petitioner had possession and control of the "trust fund" and made the decisions as to the entities who could enroll, the persons who could benefit, the charges for the insurance, and the payments to the beneficiaries, there was nothing of substance left to be "controlled" by anyone.

Finally, Sonny's apparent failure to formally adopt the trust agreement negates the contention that there was a multiemployer plan as a matter of law. 29 C.F.R. § 2510-37(b)(i)(A); *See also Wayne Chemical, Inc. v. Columbus Agency Service Corp.*, 567 F.2d 692 (7th Cir. 1977). The fact that Sonny's was allowed to participate in the insurance program *without* adoption of the Trust (FOF 6; Pet. App., C4-C5) is a strong indication that the adoption of the Trust was regarded as a mere technicality that could be easily and readily disregarded.

B. Under Federal Case Law, Petitioner Failed To Establish That Sonny's Formed An Individual Benefit Plan Subject To ERISA.

The Employee Retirement Income Security Act of 1974 (29 U.S.C. § 1001 *et seq.*) applies only to plans established or maintained:

(1) By any employer *engaged in commerce or in any industry or activity affecting commerce;* or

(2) by any employee organization or organizations representing employees engaged in any industry or activity affecting commerce.

29 U.S.C. § 1003(a)(1) and (2). (Emphasis added). Thus, with reference to Petitioner's previously abandoned claim that Sonny's (as an "employer") formed an individual plan by subscribing to the trust, Petitioner must show that Sonny's was engaged in interstate commerce in order for ERISA to have even potential application to the "plan."

Petitioner attempts to clear this initial hurdle with an assertion that "Sonny's . . . uses interstate mail and telephone lines in performing services for IGA member's employers

in Texas and other states." (Pet., p. 60). This is a preposterous and flagrant fabrication. Nowhere in the record is there any indication that Sonny's used interstate mail and telephone lines.[23] The record is completely silent as to Sonny's involvement, *if any*, in interstate commerce. For this reason alone, Petitioner's claim that Sonny's formed an individual employee benefit plan must fail, because ERISA has no application whatsoever to a "plan" of any type formed by an employer not engaged in interstate commerce. 29 U.S.C. § 1003.

Further, Petitioner's representation that Sonny's purchased and provided insurance for "all" of its employees is a double barrelled misstatement of the record. *There was no evidence at the ERISA preemption trial that Sonny's purchased or provided any benefits, and no evidence that it had more than one employee for whom to purchase or provide insurance.* Once again, Petitioner substitutes unsubstantiated claims for record proof.[24]

The Seventh Circuit has held that securing insurance from a "multiple employer trust" does not establish an ERISA plan, unless the employer in question thereby *intends* to form a plan. *Wayne Chemical*, 567 F.2d at 698-700. The evidence supplied by Petitioner does not satisfy this test, since the record is silent as to Sonny's purpose in becoming involved with the IGA insurance program.

The Fifth Circuit has posited a two-pronged test to be used in determining whether securing insurance benefits from a multiple employer trust constituted the formation of an ERISA plan (assuming, of course, that the requisite nexus with interstate commerce is first established). *Gahn*

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[23] Similarly, there is no evidence whatsoever that Sonny's used such instrumentalities to perform services for the intrastate and interstate members of the IGA.

[24] Petitioner itself recognized the utter lack of evidence to support such a claim, as demonstrated by the fact that it declined to propose any fact findings or conclusions of law to support it in the trial court.

v. Allstate Life Insurance Co., 926 F.2d 1449, 1452 (5th Cir. 1991). Under the analysis suggested by *Gahn*, it must first be established that the "safe harbor provision" prescribed by administrative regulation does *not* apply. *Id.*, *citing* 29 C.F.R. § 2510.3-1(j) (1990). Under that rule, the insurance arrangement is *not* a statutory plan if (1) the employer did not contribute to the plan (2) participation in the plan was voluntary; (3) the employer's involvement in the plan was limited to collecting and forwarding premiums; and (4) the employer received no profit from administering the plan. *Id.*, at 1452. If all of these criteria are applicable, the plan is clearly *not* subject to ERISA. If one or more of these criteria are *not* applicable, then the plan is potentially subject to ERISA. *Id.*

In this case, Petitioner failed to distinguish its group insurance program with the IGA from those that are clearly *not* subject to ERISA under the Department of Labor regulations. At the separate trial on ERISA preemption, Petitioner failed to adduce evidence that Brown's employer contributed to the plan, or that Brown's participation was anything but voluntary. Petitioner also failed to come forward with evidence that Sonny's had any role with reference to the plan other than forwarding payments to a purveyor of insurance. Finally, it submitted no evidence that Sonny's was involved with or profited through the administration of the plan. The deposition of Ms. Richey, which was the sole evidence Petitioner offered at the ERISA preemption trial, simply focused upon the *wrong entity* – the IGA. *See Gahn*, 926 F.2d at 1452.[25]

Federal appellate courts have repeatedly emphasized that the existence of an ERISA plan is inherently a *question of*

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[25] There is virtually no evidence in the record of the separate ERISA trial concerning Sonny's. There were three related persons at Sonny's having some sort of insurance coverage through the IGA. (Richey Ex. 11). However, since the trust in question permitted employees as well as partners and proprietors to participate, it is wholly unclear whether the two persons, other than Brown, who obtained insurance through IGA were employees of, owners of, or partners in this business.

fact. Gahn v. Allstate Life Insurance Co., 926 F.2d 1449 (5th Cir. 1991); *Wickman v. North Western Nat'l Insurance Co.*, 908 F.2d 1077 (1st Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 581 (1990); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Petitioner was required to ensure that sufficient facts were developed at the separate ERISA preemption trial to support its arguments on appeal. It did not do so. Hence, it is now required to bear the consequences of any incompleteness in the record on the factual issues it raised. *See Andersen v. Cumming*, 827 F.2d 1303 (9th Cir. 1987).

Petitioner's arguments are constructed upon a foundation of misrepresentations of the record and evidence wholly outside the record of the separate trial on ERISA preemption. This Court should not allow misstatements of the facts and evidence outside the record to substitute for the proof for which Petitioner was responsible.

C. Even If Petitioner Had Established Its Preemption Claims, The Judgment Against It Would Remain Intact.

Petitioner has argued that only *two* consequences should flow from the alleged preemption of Brown's claims: (1) his claims should be dismissed because he purportedly failed to plead facts sufficient to support an ERISA claim; and (2) the jury verdict in his favor should be disregarded, because he purportedly was not entitled to a jury trial. Petitioner has *not* urged any other further "consequences" which follow from the alleged preemption or identified any further "defects" in the proceedings below. Because neither of these two "consequences" would result from the alleged preemption of Brown's claims, any holding that ERISA applied would be academic in nature and have *no effect* on the judgment.

Under Texas practice, a Plaintiff's pleading need only allege the ultimate facts constituting the elements of a cause of action. *Arkansas Fuel Co. v. State*, 154 Tex. 573, 280 S.W.2d 723 (1955). All that is required of a pleading is that it give fair notice to the defendant of the proof that will be introduced against it at trial. *Osteen v. Crumpton*, 519 S.W.2d 263

(Tex. Civ. App. – Dallas 1975, writ ref'd). Brown's pleadings stated that certain benefits were due to him from Petitioner under the terms of an insurance policy, and that Petitioner, who issued the policy, refused to pay the benefits due without reasonable basis. (F. Supp. Tr., 78). The jury findings confirmed the validity of these claims. These claims and the ensuing findings supported recovery under either state law *or* ERISA. *Firestone Tire and Rubber Co. v. Bruch*, ___ U.S. ___, 109 S.Ct. 998 (1989). Petitioner's claim that Brown's pleadings were insufficient was based solely upon the misguided belief that Brown would have to allege an "abuse of discretion" on Petitioner's part. This notion was squarely rejected in *Firestone*, 109 S.Ct. at 956.[26]

Further, nothing in ERISA prohibits state courts from conducting jury trials, even in situations – unlike this case – where the claims at issue *are* governed by ERISA. The Federal cases which have held jury trials to be unavailable in ERISA actions tried in federal court have done so by reasoning that the insured's decision was to be reviewed under an "arbitrary and capricious" standard rather than a *de novo* standard,[27] and such a case, sounding in *equity*, is not within the *Seventh Amendment* guarantee of trial by jury. (*See Calamia v. Spivey*, 632 F.2d 1235 (5th Cir. 1980). These cases are irrelevant. The *Texas Constitution* guarantees trial by jury. It does not observe any distinction between actions at law and

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[26] The very case Petitioner *now* cites in support of the claim that Brown's pleadings and jury findings were insufficient was a *pre-Firestone* case that rejected the sufficiency of the pleadings and findings on the sole basis that no "abuse of discretion" was pleaded and found – an element subsequently rendered unnecessary by *Firestone*. *See Felts v. Graphic Arts Employee Benefits Trust*, 680 S.W.2d 891, 894 (Tex. App. – Houston [1st Dist.] 1984, no writ). The other Texas case cited by Petitioner for a different point, *Cathey v. Metropolitan Life Ins. Co.*, 805 S.W.2d 387 (Tex. 1991), was obviously one in which the pleadings were *not* sufficient to state an ERISA claim, and there were *no* findings to support such a claim.

[27] As noted, this premise has since been rejected by this Court. *Firestone Tire and Rubber Co. v. Bruch*, 109 S.Ct. at 956.

actions in equity. *State v. Credit Bureau of Laredo*, 530 S.W.2d 288 (Tex. 1975); TEX. CONST. ART. 1, § 15. It is axiomatic that if a state wishes to provide more extensive constitutional guarantees than that provided in the Federal Constitution, it is free to do so. Moreover, conducting jury trials on claims tried in state court cannot conceivably conflict with anything found in the ERISA statute.

Thus, even if Petitioner had established its preemption claims by proper pleadings, sufficient proof, and adequate findings, the result would have been the same. Its *only complaints* were that Brown's pleadings and the supporting jury findings were "insufficient," and that Brown's case was tried to a jury. Since both complaints were without merit, the judgment would have been affirmed below even if ERISA was found to have applied to Brown's claims.

CONCLUSION

WHEREFORE, Billy W. Brown, Respondent, prays that the Petition for Writ of Certiorari requested by Prudential Insurance Company of America be dismissed for want of jurisdiction. Alternatively, Brown prays the Court decline to issue a Writ of Certiorari to the Texas Fourteenth Court of Appeals. Finally, should the Court grant Petitioner's Petition for Writ of Certiorari, Brown prays the Court affirm the judgments of the 151st District Court and the Fourteenth Court of Appeals.

Respectfully submitted,

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No. 90-1884

In The

Supreme Court of the United States

October Term, 1991

PRUDENTIAL INSURANCE COMPANY OF AMERICA,

Petitioner,

v.

BILLY W. BROWN,

Respondent.

Petition For A Writ Of Certiorari To The Texas Court Of Appeals For The Fourteenth Supreme Judicial District

RESPONDENT BILLY W. BROWN'S APPENDIX

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No. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
VS.	§	COURT OF HARRIS
	§	COUNTY, TEXAS
PRUDENTIAL INSURANCE COMPANY OF AMERICA	§	151ST JUDICIAL
	§	DISTRICT

DEFENDANT PRUDENTIAL INSURANCE COMPANY OF AMERICA'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ERISA

TO THE HONORABLE JUDGE OF SAID COURT:

The Prudential Insurance Company of America ("Prudential"), the defendant, files the attached proposed findings of fact and conclusions of law in connection with the separate trial of ERISA preemption.

Respectfully submitted,

WEIL, GOTSHAL & MANGES

By /s/ _____

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Certificate of Service

I hereby certify that a true copy of the foregoing has been hand delivered to all counsel of record on this 18th day of January, 1989.

/s/ _____
William J. Dyer

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No. 81-31687

BILLY W. BROWN	§	IN THE DISTRICT
	§	COURT OF HARRIS
VS.	§	COUNTY, TEXAS
PRUDENTIAL INSURANCE	§	
COMPANY OF AMERICA	§	151ST JUDICIAL
	§	DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ERISA PREEMPTION

BE IT REMEMBERED that pursuant to the Agreed Order dated January 17, 1989, the Court, on the same date, conducted a separate trial, *in limine*, to determine disputed issues of fact relating to Defendant The Prudential Insurance Company of America's affirmative defense that the state-law claims of Plaintiff Billy W. Brown ("Mr. Brown"), as pleaded in Plaintiff's Second Amended Original Petition and Plaintiff's Third Amended Original Petition, are preempted pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* Based on the evidence adduced at that separate trial, the Court makes the following findings and conclusions:

FINDINGS OF FACT

1. Prudential issued a policy of group insurance to the Independent Automotive Service Association Insurance Trust ("Insurance Trust").

2. The Insurance Trust was established in 1964 by the officers of the Independent Garagemen's Association of Texas ("IGA") (later known as the "Independent Automotive Service Association" and as the "Automotive Service Association"), through a written agreement and Declaration of Trust ("Declaration of Trust") (Richey 10; Richey Ex. 2).

3. Sonny's Automatic Transmission Service, Inc., Mr. Brown's employer, provided health insurance to its employees through the IGA and the Insurance Trust.

4. At all material times to this lawsuit, Mr. Brown was a member of the group insured by the Prudential policy.

5. At all material times to this lawsuit, the Insurance Trust provided medical and life insurance coverage for the employees of the members of the IGA, such as Mr. Brown.

The Insurance Trust is an Employee Benefit Plan

6. The Insurance Trust has filed the Declaration of Trust (Richey Ex. 2) and other documents with the United States Government for the purpose of complying with ERISA; the Insurance Trust considers the Declaration of Trust to be "the plan" for purposes of ERISA. (*See* Richey 17-18 and Richey Ex. 1.) The Insurance Trust is not aware

of any other formal written plans prepared in connection with the requirements of ERISA. (Richey 40-41.)

7. *Intended Benefits.* Article I of the Declaration of Trust identifies the intended benefits of the Insurance Trust as being the provision of "life and accident and health insurance" through "one or more group policies issued by insurance carriers." (Richey Ex. 2, p. 1.)

8. *Intended Class of Beneficiaries.* Article I also identifies the intended class of beneficiaries of the Insurance Trust as being "employees of employers and members of families of employees," and requires that such "employees" be "actively engaged in and devote a substantial part of their time to the conduct of the business of the employer." (Richey Ex. 2, p. 1.)

9. *Source of Financing.* Articles III and IV of the Declaration of Trust also establish the source of financing for the Insurance Trust (payments of subscribers to the fund, contributions required of employees of subscribers, etc.), and the proper uses of the funds held by the Insurance Trust (to pay expenses, pay premiums, make investments, make refunds, etc.). (Richey Ex. 2, pp. 2-3.)

10. *Procedures for Receiving Benefits.* Article II of the Declaration of Trust authorizes the trustees of the Insurance Trust to procure suitable insurance policies; "to take any action with respect to each policy or the insurance provided thereunder permitted by the insurance carrier"; and to agree with insurance carriers that a representative of the trustees may "sign drafts upon the insurance carrier in the amounts approved for the payment of claims under a policy," thereby facilitating "short method claim

administration." (Richey Ex. 2, pp. 1-2). Article III, section 4 authorizes the trustees to "adopt such rules and regulations including any requirements for eligibility of Subscribers for participation in the Trust and require the Subscribers to furnish such information as the Trustees deem necessary or advisable." (Richey Ex. 2, p. 3.) Through these provisions, Article II generally establishes the procedures for receiving benefits under the Insurance Trust. The Insurance Trust communicates those procedures more specifically to the IGA members and their employees at least in part through providing them with "plan booklets" provided by the insurance carrier, which include benefit schedules and procedures for making and appealing claims. (Richey 75-76; *see* Richey Ex. 12.)

11. The Declaration of Trust also contains, in Article VII, provisions for its amendment and termination. (Richey Ex. 2, pp. 5-6.)

12. In connection with the Prudential policy, the Insurance Trust performed administrative duties, such as sending out billings, accepting premium payments, paying claims, and keeping records. (Richey 27-28; *see, e.g.*, Richey Ex. 11, the invoice to Mr. Brown's employer for premiums; Richey Ex. 3, the enrollment card for Mr. Brown; and Richey Ex. 14, the claims filed for Mr. Brown.) The Insurance Trust considers itself to be what is commonly termed a "third party administrator" (Richey 27).

13. Prudential, as an insurer, was provided by the Insurance Trust with a membership list of IGA members, and solicited employees of IGA members from that list (rather than soliciting to the general public or to automobile repair businesses which were not already IGA members). (Richey 14.)

14. The Insurance Trust is therefore a plan, fund, or program established or maintained by the IGA for the purpose of providing the employees of IGA members with medical, surgical, or hospital care benefits.

15. Neither the IGA nor the Insurance Trust was established by individual employees or by entrepreneurial businesses; they do not operate for purposes of making a profit. (Richey 88-89.)

16. Working with the insurance carrier it has selected, the Insurance Trust files an Annual Report to the U.S. Government on Form 5500, which forms purport to be filed under section 104 of ERISA, 29 U.S.C. § 1024. These forms all identify the "plan" as the Independent Garagemen's Association Insurance Trust, and state that the effective date of the plan was 1964 (the year in which the Declaration of Trust was executed). (Richey Ex. 5-9.) The Insurance Trust also provides participants with Summary Annual Reports each year, which also purport to be provided "as required under [ERISA]." (Richey Ex. 10). These reports and summaries generally comply with the regulations established by the Department of Labor in 29 C.F.R. part 2520.

17. The Insurance Trust believes itself to be subject to the provisions of ERISA, and would not undertake the trouble and expense of complying with federal reporting regulations if it did not so believe. (Richey 93-94.)

The IGA Acts Indirectly in the Interest of the Employers

18. Membership in the IGA is limited to independent automotive repair shops in the United States and

several foreign countries. Although a broad range of automobile repair services are performed by the IGA members, only those who are somehow in the business of repairing automobiles are eligible for membership. (Richey 33-34, 48-50.)

19. Only employees of IGA members can obtain insurance through the Insurance Trust. (Richey 33-34, 43; Richey Ex. 2.)

20. As a condition for obtaining insurance for their employees through the Insurance Trust, the IGA members had to adopt or ratify or execute the Declaration of Trust for the Insurance Trust (Richey 37; Richey Ex. 2).

21. A four-member board of trustees, who are all independent automotive service people, oversees the entire operation of the Insurance Trust. (Richey 31-32, 89; Richey Ex. 2.) The Trustees are all independent garagemen who have been active in IGA work "throughout the years." (Richey 32.) They receive no remuneration. (Richey 33.)

22. One example of the supervision and control of the Insurance Trust by the Trustees was the decision to switch from Prudential to another insurer. (Richey 41.)

23. The IGA may remove any trustee of the Insurance Trust from office at any time by a simple written instrument delivered by the IGA to all Trustees. The IGA may also appoint successor Trustees by delivering a written instrument to all Trustees. (Richey Ex. 2, at p. 4, art. V, §§ 4-5.) Through these provisions, the IGA – and therefore, its employer members – indirectly control, and have indirect responsibility, for the Insurance Trust and its

acquisition of health insurance for the IGA members' employees.

The IGA is Also an "Employee Organization"

24. Both the IGA members and their employees participate in the IGA – by receiving IGA newsletters, attending IGA conventions, and like activities typical of those conducted by trade associations. (Richey 84-85.)

25. Also, through their communications with the IGA and the Insurance Trust regarding the health insurance coverage they have obtained through the Insurance Trust, the employees of the IGA members participate in the IGA and the Insurance Trust. (*See, e.g.*, Richey 42, 78, 82-83; Richey Ex. 14, communications with Mr. Brown and his attorneys.)

26. The Insurance Trust deals with employers concerning the Insurance Trust and other matters incidental to employment relationships, like health insurance. (Richey 87.) For example, the Insurance Trust collects premiums (*see* Richey Ex. 11) and enrollment cards (*see* Richey Ex. 3) from employers.

The IGA and Insurance Trust Affect Interstate Commerce

27. Both the IGA and the Insurance Trust have used the interstate mails and telephone lines in performing services for the IGA members' employees in Texas and other states. (Richey 46, 89-91.) Accordingly, both the IGA and the Insurance Trust operate in, and have an effect upon, interstate commerce.

CONCLUSIONS OF LAW

1. The IGA is an "employer" under 29 U.S.C. § 1002(5) because it is a "person" (within the meaning of 29 U.S.C. § 1002-(9)) acting "indirectly in the interest of an employer [e.g., Sonny's Automotive] in relation to an employee benefit plan." *See Income Security Corp., Inc., et al. v. Louisiana Oilfield Contractors Assoc., Inc.*, No. CV86-1664 (W.D. La. 1987) (Louisiana Oilfield Contractors Association (LOCA), a corporate association of employers that acted in the interest of the employers in creating, administering, and operating the LOCA Plan, was an "employer" under ERISA.)

2. The IGA is also an "employee organization" under 29 U.S.C. § 1002(4) because it is an organization "in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships." *See Income Security Corp. v. Louisiana Oilfield Contractors Association, Inc.*, No. CV86-1664 (W.D. La. 1987) (LOCA Trust, a tax-exempt entity under the Internal Revenue Code, was an "employee organization" under ERISA).

3. A trade association, such as the International Garagemen's Association, can establish an employee welfare benefit plan under 29 U.S.C. § 1002(1), and a number of courts have explicitly or implicitly so held. *See, e.g., Twin City Pipe Trades Service Association v. F. Plass Plumbing & Heating Co.*, 815 F.2d 58, 59 (8th Cir. 1980) (dismissal of appeal of district court's order granting Twin City's petition to conduct an audit of the employer's records

wherein the Twin City Association was a nonprofit corporation managed by employers and employees in "the plumbing and pipefitting industry" that had established a multi-employee benefit agreement under ERISA); *Minnesota Chamber of Commerce & Industry v. Hatch*, 672 F. Supp. 393 (D. Minn. 1987) (state law was preempted by ERISA where plaintiff was association whose members provided health benefit plans to their employees, and parties to lawsuit agreed that the plaintiffs' members provided health benefit plans subject to ERISA); *Income Security Corp v. Louisiana Oilfield Contractors Association*, No. CV86-1664 (W.D. La. Sep. 28, 1987) (health care and major medical benefits trust established by employer association was ERISA employee welfare benefit plan, since plan operated under trust agreement and summary plan description in order to provide benefits for employees of association's member companies and their dependents, and since agreement was written to conform with ERISA requirements for providing benefits to intended beneficiaries and source of financing and trustees responsibilities, and since it provided benefits schedule, statement of rights, and claims procedure); *California Chamber of Commerce v. Simpson*, 601 F. Supp. 104, 106 (C.D. Cal. 1985) (California Labor Commissioner was enjoined from enforcing state law and procedures with respect to severance benefit plans because such laws and procedures were preempted by ERISA; California Chamber of Commerce, a non-profit corporation, was a "statewide membership trade association made up of business members," and both "[i]t and its members are ERISA 'employers' "); *Southeastern Lumber Manufacturers Association, Inc. v. Walthour Agency, Inc.*, 486 F. Supp. 781 (N.D.

Ga. 1980) (federal court had subject matter jurisdiction under pendant jurisdiction doctrine over malpractice claims against accountants and accounting firm in lawsuit where a valid claim under ERISA had been pleaded by lumber manufacturers association that created voluntary employee benefit plan and trust pursuant to ERISA).

4. Pre-ERISA, an employee benefit plan was distinguishable from insurance in that "most" employee benefit plans were "non-profit, non-advertising, and provided by employers, or pre-exiting [sic] employee groups." *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382, 390 (D. Kan. 1977). Pre-ERISA, an "employees' beneficiary association" under the Welfare and Pension Plans Disclosure Act, as amended by the Welfare and Pension Plans Disclosure Act Amendments of 1962, 29 U.S.C. § 302(a)(3), was defined by the Department of Labor as one where "membership in the association must be conditioned on one's employment status," e.g., limited to employees of a specific employer or employers, or members were required to be members of one union. *Bell*, 437 F. Supp. 382, 395, *citing* Department of Labor, *The Welfare and Pension Plans Disclosure Act Interpretive Manual*. Accordingly, because of the nonprofit nature of the IGA and the Insurance Trust, and the limitation on participation in them to those engaged in the automobile repair industry, the Insurance Trust was an "employee benefit plan" even as that term was understood prior to the passage of ERISA in 1974.

5. The IGA and the Insurance Trust are clearly distinguishable from the "employers" or "employee organizations" at issue in *Taggart Corp. v. Life & Health Benefits Administration, Inc.*, 617 F.2d 1208 (5th Cir. 1980), *on appeal*

from Taggert Corp. v. Efros, 475 F. Supp. 124 (S.D. Tex. 1979), *cert. denied*, 450 U.S. 1030 (1981). The "trust" in *Taggart* was a proprietary enterprise, established and operated by independent businessmen for their personal profit; it acted as a mere conduit for hundreds of unrelated subscriber customers for which it forwarded premium payments to a group insurer; no employer participated in either the "trust's" day-to-day operation or administration. 617 F.2d at 1210. The district court's opinion in *Taggart* also reveals that there were subscriptions to the plan directly by employees without the knowledge of their employers, and that the "trust" was intended to be an actuarially sound profit-making enterprise, which put it "outside the traditional concept of an employee benefit plan." 475 F.Supp. at 126, 127. Finally, the single employer – Taggart Corp. – was argued by the Secretary of Labor to have established a "single employer welfare plan" by subscribing to the "trust"; but the Taggart Corp.'s "plan" was a "bare purchase of insurance," 617 F.2d at 1211, that benefited only Taggart's president and his family, 475 F.Supp. at 127. None of these facts exist in the case of the IGA and the Insurance Trust.

6. Indeed, *Taggart* has been interpreted to be "limited [in] its holding to those situations in which 'the purchasing employer neither directly or indirectly owns, controls, administers or assumes responsibility for the policy or its benefits.' " *Davis v. Time Insurance Co.*, 696 F. Supp. 1317, 1320 (S.D. Miss. 1988) (quoting *Taggart*, 617 F.2d at 1211). *See also Donovan v. Dillingham*, 668 F.2d 1367, 1375 (11th Cir. 1982) (en banc) (disagreeing with *Taggart* "if [it] implies that an employer or employee

organization that only purchases a group health insurance policy or subscribes to a [multi-employer trust] to provide health insurance to its employees or members cannot be said to have established or maintained an employee welfare benefit plan").

7. The IGA's and the Insurance Trust's observance of ERISA's formalities also distinguish this case from those such as *Jordon v. Reliable Life Insurance Co.*, 694 F. Supp. 822 (N.D. Ala. 1988), where there was no written document meeting the requisites of 29 U.S.C. § 1102, and such documentation as there was did not provide for fiduciaries with authority to control and manage the plan, or a procedure for establishing and carrying out a funding policy, or a procedure for the allocation of responsibilities for the operation and administration of the plan. The Insurance Trust's Declaration of Trust in this case satisfies all of these requirements.

8. Similarly, the case at bar is clearly distinguishable from *Bell v. Employee Security Benefit Association*, 437 F. Supp. 382 (D. Kan. 1977), in which the Employee Security Benefit Association's (EBSA) plan was found to be "insurance" and not an "employee welfare benefit plan" because EBSA was organized by third party entrepreneurs to market insurance products or other services, its members were employees from a variety of occupations with no commonality of interests, it solicited and marketed members through insurance agencies, it was not a non-profit entity, and employers did not necessarily know if their employees had purchased an EBSA policy.

9. Under the literal terms of 29 U.S.C. § 1002(1), the Insurance Trust is an "employee welfare benefit plan"

because it was "established [and] maintained by an employer or by an employee organization or by both [as is true of the IGA] . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits. . . . " Under the judicial gloss on the statute, the Insurance Trust also qualifies as [sic] "employee welfare benefit plan" under 29 U.S.C. § 1002(1) because it (1) is "provided by an employer or homogeneous employee organization"; (2) is "non-commercial in nature"; (3) does "not involve solicitation"; (4) is "not intended to be actuarially sound"; and (5) is able to provide rates "substantially lower than insurance rates." *Bell*, 437 F. Supp. 382, 391 (discussing post-ERISA Congressional intent as set forth in Activity Report of the Committee on Education and Labor of the U.S. House of Representatives, H.R. 94-1785 (1976)).

10. The Insurance Trust also qualifies as a "plan, fund, or program" under ERISA because the Declaration of Trust and the surrounding circumstances would allow a reasonable person to "ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits." *E.g., Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982) (en banc).

11. The Insurance Trust is also an "employee welfare benefit plan" because

> the intended benefits [are] health . . . benefits; the intended beneficiaries [are] . . . employees, former employees or their beneficiaries; and an employer or employee organization, or both, and not individual employees or entrepreneurial businesses, must establish or maintain the plan, fund, or program.

Id. Accord, Ed Miniat, Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732, 738-39 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 3188 (1987); *Davis v. Time Insurance Co.*, 696 F. Supp. 1317, 1319 (E.D. Miss. 1988).

12. There is "no requirement of a formal, written plan in either ERISA's coverage section or its definitions section"; and although ERISA's "fiduciary and reporting provisions require that the plan be [sic] established written instrument, . . . clearly these are only the responsibilities of administrators and fiduciaries of plans covered by ERISA and are not prerequisites to coverage under the Act." *E.g., Donovan*, 688 F.2d at 1372. Nonetheless, the Declaration of Trust for the Insurance Trust – because it meets all of the requirements set forth in *Donovan* and similar cases – is wholly adequate to serve as a written "plan, fund, or program" within the meaning of ERISA.

13. As an "employee welfare benefit plan," the Insurance Trust is also, by definition, an "employee benefit plan" under 29 U.S.C. § 1002(3).

14. Under 29 U.S.C. § 1003(a), ERISA applies to the Insurance Trust because it is an "employee benefit plan" that was "established or maintained" by an [sic] both an "employer" and an "employee organization" engaged in commerce or in an industry or activity affecting [interstate] commerce."

15. ERISA "supersede[s] any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a).

16. All of the state-law claims pleaded by Mr. Brown in Plaintiff's Second Amended Petition and Plaintiff's Third Amended Original Petition are therefore preempted by ERISA. *E.g., Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987); *Metropolitan Life Insurance Co. v. Taylor*, 107 S. Ct. 1542 (1987); *Juckett v. Beecham Home Improvement Products, Inc.*, 684 F. Supp. 448 (N.D. Tex. 1988) (Sanders, J.) (preemption of claims under Texas law); *Cathey v. Metropolitan Life Insurance Co.*, No. 01-88-00046-CV (Tex. App. – Houston [1st Dist.] Dec. 22, 1988, no writ) (ERISA preempts claims under Texas laws for breach of contract, "bad faith" claims handling, breach of implied covenant of good faith and fair dealing, 12% penalty under Ins. Code art. 3.62, DTPA, and Ins. Code art. 21.21).

17. The Court therefore finds that Plaintiff's Second and Third Amended Original Petitions should be stricken, but that in the interests of justice, Mr. Brown should be afforded an opportunity to replead to allege claims under ERISA. The Court will enter an appropriate separate order to that effect.

SIGNED on this ___ day of January, 1989.

JUDGE PRESIDING

Supreme Court, U.S.
FILED
AUG 8 1991
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NO. 90-1884

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

Prudential Insurance Company
of America,
Petitioner,

v.

Billy W. Brown,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS FOURTEENTH COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY

I.

THE VITAL REASONS FOR GRANTING THIS PETITION STAND UNCHALLENGED

There are hundreds, if not thousands, of multi-employer trusts similar to the IGA Trust in operation across the country through which smaller employers are able to provide their workers with better health care benefits at lower cost than they would be able to provide through individual employer plans. Many of these trusts are sponsored by industry trade associations, and many are sponsored jointly by trade associations and unions through multi-employer collective bargaining. The rule established by the state appellate court below -- that none of these plans constitute ERISA-covered "employee welfare benefit plans" unless the individual employers

participate in the "day-to-day operation or administration" of the plan (App. A-12) -- is at once nonsensical from a practical standpoint and not authorized by the letter or spirit of ERISA.

This Court recently articulated the rationale for ERISA preemption, in words which are particularly apt here, as follows:

> Section 514(a) was intended to ensure that plans and plan sponsors would be subject to a uniform body of benefit law; the goal was to minimize the administrative and financial burden of complying with conflicting directives among States or between States and the Federal Government. Otherwise, the inefficiencies created could work to the detriment of plan beneficiaries. *FMC Corp.*, 498 U.S., at __, 111 S.Ct., at 408 (citing *Fort Halifax*, 482 U.S., at 10-11); *Shaw*, 463 U.S., at 105, and n.25, 103 S.Ct., at 2094, and n.25. Allowing state based actions like the one at issue here would subject plans and plan sponsors to burdens not unlike those that Congress sought to foreclose through § 514(a).

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Ingersoll-Rand Co. v. McClendon, __ U.S. __, 111 S.Ct. 478, 484 (1990) (emphasis added).

By engrafting on to ERISA a requirement that individual employers participate in day-to-day administration of multi-employer welfare benefit plans, the state appellate court below has put itself at odds with the decisions of two federal appellate courts.[1] Moreover, the issue posed is of obvious and critical importance to the proper administration of ERISA, because the rule established by the state appellate court would eliminate most multi-employer welfare benefit plans from the scope of ERISA's coverage.

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1. See *Kidder v. H & B Marine, Inc.*, 932 F.2d 347 (5th Cir. 1991); *Memorial Hospital System v. Northbrook Life Insurance Co.*, 904 F.2d 236 (5th Cir. 1990); *Kanne v. Connecticut General Life Ins. Co.*, 867 F.2d 489 (9th Cir.), cert. denied, 492 U.S. 906 (1989).

Rather than addressing the substance of the important policy questions raised under ERISA by the lower court's decision, Respondent, in its Brief in Opposition, has advanced a series of erroneous hypertechnical arguments largely concerning ancillary matters.[2] As briefed in the points below, Respondent's technical arguments are without merit and should not divert this Court from considering the important

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2. For example, Respondent begins by asserting that Petitioner's Appendix fails to comply with Supreme Court Rule 14(k)(i) because it does not include the January 19, 1989 interlocutory ruling of the Texas trial court on ERISA preemption. Respondent has, however, clearly misinterpreted Rule 14(k)(i), which requires that the appendix contain: "The opinions, orders, findings of fact, and conclusions of law . . . delivered upon the rendering of the judgment or decree by the court whose decision is sought to be reviewed" (emphasis added). Petitioner seeks review of the Texas Fourteenth Court of Appeals' decision, not the trial court's decision. In any event, the January 19, 1989 "ruling" was only an interlocutory ruling that was merged into the trial court's final ruling on ERISA preemption. See Point III below.

substantive issue raised by this case concerning the scope of ERISA.

II.

THIS COURT PLAINLY HAS JURISDICTION UNDER 28 U.S.C. § 1257

Respondent argues that this Court does not have jurisdiction under 28 U.S.C. § 1257 because the Texas Supreme Court has not "passed upon" the federal claim raised in the trial court, and because Petitioner has impermissibly "switched" theories. (Opp. Br. at 2-3) Respondent's argument is without merit.

Under Section 1257(a), this Court has jurisdiction to review state court decisions where a federal question has been both raised and decided in the courts below. See *McGoldrick v. Compagnie Generale*, 309

U.S. 430, 435-36 (1940); *Illinois v. Gates*, 462 U.S. 213 (1983).

In *Illinois v. Gates*, this Court commented as follows:

> [W]e have recognized that it often may be unclear whether the particular federal question presented in this Court was raised or passed upon below. In *Dewey v. Des Moines*, 173 U.S. 193, 197-198, 19 S.Ct. 379, 380-381, 43 L.Ed 665 (1899), . . . the Court said that "if the question [in this Court] were only an enlargement of the one mentioned in the assignment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the lower court's judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed."

Id. at 219 (emphasis added).

Applying *Gates*, it is clear that the ERISA preemption defense has been both "raised" and "passed upon" below. Prudential has consistently raised this defense in the Texas trial court, Fourteenth Court of Appeals and Texas Supreme Court, and both the state trial court and intermediate appellate court expressly rejected this defense.[3]

Respondent's real argument is not that ERISA preemption was not raised and passed upon below, but that Petitioner has somehow waived its rights by advancing alternative theories to support the legal conclusion that ERISA preempts Respondent's state law claims. However, under *Gates*, it is plainly permissible for Petitioner to advance such alternative arguments here.

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3. See Petition at 9-14.

III.

ALL EVIDENCE ADDUCED IN THE TRIAL COURT MAY BE CONSIDERED IN ASSESSING THE ERISA PREEMPTION DEFENSE

Respondent argues that Petitioner impermissibly relies upon evidence which was introduced at the trial on the merits, subsequent to the preliminary ERISA preemption trial. However, Respondent neglects to mention that, at the completion of the preliminary ERISA preemption trial, the trial court ordered that Petitioner's ERISA motion be carried forward through the subsequent jury trial and that the trial court make fact-findings on ERISA at the conclusion of all the evidence produced at the subsequent trial.[4]

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4. E.P. Tr. 120-29.

The trial court did not render a final judgment on all matters, including ERISA preemption, until April 3, 1989, and did not enter its own findings of fact and conclusions of law on ERISA preemption until May 2, 1989. Thus, all of the evidence introduced both at the preliminary ERISA preemption trial and the subsequent trial on the merits was considered by the trial court in rejecting the ERISA preemption defense, and properly may be considered by this Court.

IV.

THE STATE COURTS BELOW CLEARLY ERRED IN FAILING TO SUSTAIN PETITIONER'S ERISA PREEMPTION DEFENSE

Respondent does not dispute that he was a participant in a welfare benefit "plan, fund or program" as that phrase is defined under ERISA, with ascertainable

(1) benefits, (2) beneficiaries, (3) financing and (4) procedures for receiving benefits. See *Donovan v. Dillingham*, 688 F.2d 1367, 1372 (11th Cir. 1982) (en banc). Rather, Respondent challenges whether either Sonny's or the IGA was an "employer" for the purposes of ERISA, such that the welfare benefit plan established by the IGA and subscribed to by Sonny's would constitute an "employee welfare benefit plan" governed by ERISA. Clearly, both these entities meet the definitional requirements of an "employer" under ERISA and, thus, Respondent was claiming benefits under an ERISA-covered "employee welfare benefit plan" under either theory as to who was the statutory "employer."

A. Sonny's Is An "Employer" For The Purposes of ERISA

Respondent contends that Sonny's is not an "employer" under ERISA because it allegedly is not engaged in interstate commerce. (Opp. Br. at 25-26) Under ERISA, a welfare benefit plan affects interstate commerce if it is established and maintained "by an employer engaged in commerce or in any industry or activity affecting commerce."[5] 29 U.S.C. § 1003(a).

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5. In defining this phrase, ERISA provides:

> The term 'industry or activity affecting commerce' means any business or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce, and includes any activity or industry 'affecting commerce' within the meaning of the Labor Management Relations Act, 1947, or the Railway Labor Act.

29 U.S.C. § 1002(12). The term "activity affecting commerce" is an "expression of Congress' intent to regulate within the full sweep of its constitutional authority" and as such, the phrase is given an expansive interpretation. See *Winterrowd v. David Freeman and Co., Inc.*, 724 F.2d 823, 825 (9th Cir. 1984).

Sonny's is an independent automotive repair shop engaged in the business of servicing automotive vehicles. One would be hard pressed to identify any industry in America that more directly affects the means by which the bulk of interstate commerce is carried out today. Without question, this industry satisfies the ERISA definition of "interstate commerce."

Additionally, Respondent asserts that the welfare benefit plan provided by Sonny's is exempt from ERISA coverage under administrative regulation, 29 C.F.R. § 2510.3-1(j). See *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1452 (5th Cir. 1991). However, this regulatory exemption is not applicable because one of the requirements is not satisfied: Respondent's health care benefits were provided and paid for in their entirety by

Sonny's as an employee benefit. (Richey Depo. pp. 81, 82; S.F. Tr. 668)

B. The IGA Is An "Employer" For The Purposes of ERISA

Respondent also argues that the IGA is not a statutory "employer" under Section 3(5) of ERISA, which includes a cognizable "group or association of employers." (Opp. Br. at 19-25) Respondent cites several decisions which he asserts rejected ERISA preemption claims with respect to association-sponsored employee welfare benefit plans. (Opp. Br. at 19-20) The cases cited, however, do not hold that trade associations, such as the IGA, cannot constitute an "employer" for the purpose of ERISA.[6] Respondent has failed to show why

6. See, e.g., *Gahn v. Allstate Life Ins. Co.*, 926 F.2d 1449, 1452 (5th Cir. 1991) (case remanded for further fact finding since record (continued...)

the IGA, as a bona fide trade association of employers engaged in the automotive repair business, would not constitute a cognizable "group or association of employers" for the purpose of ERISA.[7]

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6. (...continued)
was inadequate to determine whether an employer had established an employee welfare benefit plan); *Matthew 25 Ministries v. Corcoran*, 771 F.2d 21, 22 (2d Cir. 1985) (plan sponsor held to be no more than an "unlicensed insurance operation," rather than a bonafide employer association); *Taggart Corp. v. Life and Health Benefits Admin., Inc.*, 617 F.2d 1208, 1210 (5th Cir. 1980), cert. denied, 450 U.S. 1030 (1981) (multi-employer trust was not controlled by an employer association, but was a "proprietary enterprise, established and operated by individual businessmen for their personal profit"); *Wayne Chemical, Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692, 699 (7th Cir. 1977) (individual employer had no knowledge of, or intent to participate in plan sponsored by any employer association); *Donovan v. Dillingham*, 688 F.2d 1367 (11th Cir. 1982) (all parties agreed that the multi-employer trust was not itself an employee welfare benefit plan; trust was not established by an employer association).

7. Respondent further argues that the IGA Trust is not governed by ERISA because it is "over inclusive" and encompasses ineligible participants. (Opp. Br. at 20-23) This simply is not true. Article I of the Declaration of Trust identifies the intended class of beneficiaries of the Insurance Trust as being "employees of employers and members of families of employees" (Pet. App. J-2; Richey Ex. 2, (continued...)

Respondent next argues (without record citation) that the IGA Trust was controlled by the insurance carrier, Prudential, rather than the IGA members. (Opp. Br. at 23-25) The DOL has recognized that a trade "association" exercises direct and/or indirect control over a trust plan if "[t]he association . . . is given the authority to amend or terminate the Trust and to replace the Trustees." Dep't of Labor Op. Ltr. 84-23A (May 23, 1984) (emphasis added). The Board of Trustees of the IGA Trust, composed of IGA member employers, had control over the Trust by its power to remove

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7. (...continued)
p. 1); and, the Group Policy issued by Prudential further limited the class of beneficiaries to IGA member employees (and their respective family members) "engaged in the repair and servicing of automobiles." (See Richey Ex. 13, p. 3) See *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 240 (5th Cir. 1990) (court looked to "group policy" to determine, inter alia, the class of beneficiaries). See also *Holcomb v. Pilot Life Ins. Co.*, 754 F. Supp. 524, 527 (S.D. Miss. 1990).

trustees, to appoint successor trustees, to terminate the Trust and to contract with an insurance carrier. (Richey Dep. pp. 31, 32, 78; Richey Ex. 2, pp. 4-5) Thus, the IGA clearly controlled the essential operations of the IGA Trust. Prudential certainly possessed no control with respect to these essential functions.

Finally, Respondent argues that Sonny's failure to "formally adopt" the IGA Trust agreement defeats the existence of a multi-employer trust. (Opp. Br. at 25) Respondent urges that such "formal adoption" is required by 29 C.F.R. § 2510-37(b)(i)(A) and *Wayne Chemical Inc. v. Columbus Agency Serv. Corp.*, 567 F.2d 692 (7th Cir. 1977). Neither the cited regulations nor the cited decision imposes any such technical requirement. Rather, these authorities require knowledge of and intent

to adopt the trust agreement, and Sonny's actions here certainly establish such knowledge and intent. Quite simply, Respondent received benefits which could only be provided by virtue of Sonny's adoption of the trust agreement.

C. If This Court Rules That ERISA Preempts Respondent's State Law Claims, The Judgment Must Be Reversed

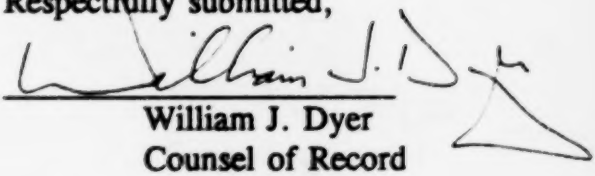
Respondent boldly asserts that even if Petitioner established its preemption defense, this would not affect the judgment. This assertion is plainly specious. Under ERISA, Respondent would not be entitled to a jury trial, *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. 1980), and Respondent would not be entitled to the $500,000 in punitive damages awarded below. *Sommers Drug Stores Co. Employee Profit*

Sharing Trust v. Corrigan Enterprises, Inc., 793 F.2d 1456, 1463 (5th Cir. 1986). Moreover, the factual issues and legal standards would be different. See, e.g., *Bruch v. Firestone Tire and Rubber Co.*, __ U.S. __, 109 S.Ct. 948 (1989); *Board of Trustees of Cedar Rapids Pediatric Clinic, P.A., Pension Plan v. Continental Assurance Co.*, 690 F. Supp. 792, 795-96 (W.D. Ark. 1988).

Conclusion

Petitioner prays that this Court grant the petition in order to resolve the conflict among the state and federal courts on the sole issue presented.

Respectfully submitted,



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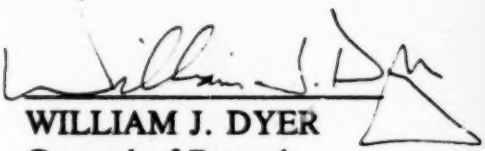
CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of August, 1991, three (3) copies of the Petitioners' Reply Brief to Brief in Opposition were served by first class mail, postage prepaid, to Millard A. Johnson, 4500 First Interstate Bank, 1000 Louisiana, Houston, Texas 77002-5012, (713) 224-5771. All parties required to be served have been served. I am a member of the Bar of this Court.



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